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REPORTS OF CASES
DECIDED IN THE
COURT OF APPEAL,
DURING THE YEAR 1894.



REPORTED UNDER THE AUTHORITY OF
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OF THE
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

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ONTARIO

APPEAL REPORTS.

ROE V. VILLAGE OF LUCKNOW.

Negligence—Nuisance—Highway—Steam Whistle on Adjoining Land—Horse—Evidence.

The mere fact that a horse while being driven along the highway has been frightened by the whistle of a steam engine, used by the defendants for the purpose of their lawfully operated water-works, is not sufficient to make them responsible for damages resulting from the horse having run away. Some positive evidence of negligence in the use of the whistle must be given, or at least some evidence that its use might be expected to cause such an accident, so as to cause it to be a nuisance to the highway.

Judgment of the County Court of Huron reversed, MACLENNAN, J. A., dissenting.

THIS was an appeal by the defendants from the judgment of the County Court of Huron. Statement.

The action was brought by the plaintiff to recover damages for injuries suffered by his horse in running away, in consequence of, as he alleged, the negligent and unnecessary use by the defendants of a steam whistle at their water-works. Their engine house stood close to the highway, and the whistle was used as a signal to workmen to turn water off and on, and to notify them of the hours of work. It had been in use for two or three years before the accident in question happened, and no complaint had ever been made of any danger to horses. It was shewn that the use of some signal was necessary, for owing to the mode in which the pipes were laid in certain parts of the village, the water had to be turned off when the engine was not pumping. On the occasion in

Statement. question, the horse, in charge of the plaintiff's servant, was being driven along the highway, and when about 125 feet from the engine house the whistle was sounded, and the horse ran away, suffering the injury complained of. The engineer knew before he blew the whistle that the branch man had turned off the water, and had returned to the engine house, but he explained that he blew it to warn anyone who might have a branch key to cease taking water, and he admitted that he did not look along the road before whistling. The defendants denied that they were guilty of negligence, and alleged that the driver was not paying proper attention to the animal. The plaintiff contended that the case came within the rule of law laid down in *Fletcher v. Rylands*, L. R. 1 Exch. 265 ; 3 H. L. 330 ; and that, therefore, it was not necessary to prove negligence, and the learned County Court Judge so held, also holding that no contributory negligence had been made out, and he assessed the damages at \$125.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., and OSLER, and MACLENNAN, J. J. A., on the 13th of September, 1893.

Garrow, Q. C., for the appellants. The learned County Court Judge is in error in holding that the doctrine of *Fletcher v. Rylands*, applies to a case of this kind. The gist of the action is negligence, and negligence is rightly charged in the statement of claim. Unless such negligence is established the action must be dismissed. It is not the mere act of sounding the whistle that in itself gives a right of action, but an improper and unreasonable sounding of the whistle amounting to negligence or to a public nuisance. Nothing of this kind can be pointed out in the present case, and the action, therefore, should have been dismissed : *Howe v. Hamilton and North-Western R. W. Co.*, 3 A. R. 336 ; *Manchester, etc., R. W. Co. v. Fullarton*, 14 C. B. N. S. 54 ; *Stott v. Grand Trunk R. W. Co.*, 24 C. P. 347 ; *Wilkins v. Day*, 12 Q. B. D. 110 ; *Brown v.*

Eastern and Midlands R. W. Co., 22 Q. B. D. 391. There is, moreover, sufficient evidence of contributory negligence. Argument.

Aylesworth, Q. C., for the respondent. This case comes within the doctrine of *Fletcher v. Rylands*. The use of the whistle was not expressly authorized, and was likely to cause mischief, so that the defendants used it at their peril and are answerable for all damages naturally resulting from its use. The use of such a whistle close to the highway was very likely to frighten passing horses, and the defendants are responsible for the accident that has here resulted. If, however, the plaintiff must go further, the evidence of negligence is sufficient. It is shewn that the engineer sounded the whistle on the present occasion needlessly and without looking out for horses. See in addition to the cases already cited, *Hilliard v. Thurston*, 9 A. R. 514; *Powell v. Fall*, 5 Q. B. D. 597.

Garrow, Q. C., in reply.

December 22nd, 1893. HAGARTY, C. J. O. :—

The corporation erected water-works on some land adjoining the highway, being the main street of the village.

The building had one story, with a chimney and a steam whistle projecting above the roof. This whistle was used for several purposes; to give notice to the branchmen or hydrant men at the other end of the pipe system as to matters connected with the ordinary management of the works; for turning on or shutting off the water; in case of an alarm of fire; whenever the streets were being watered, and as a notice generally to all water users. It was said to be, as a signal, and means of communication, a necessary part of the water-works system. It was not very often used—its use would hardly average once a day.

The plaintiff's horse was being driven past the building sometime during the day, and just as he was passing, the engineer blew this whistle in the ordinary course of manage-

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ment to give notice that he was going to shut down. The horse was apparently frightened, and turned round, injuring himself and the plaintiff's property.

The works had been two or three years in operation, this whistle being used all that time for the purposes noticed.

The plaintiff's declaration charges that this whistle when blown would, from its loudness and shrillness, naturally frighten horses passing, and that it was negligently erected so close to the highway as to constitute and be a nuisance, and a source of danger to persons travelling with horses, but gave no evidence in support of these allegations.

No accident had ever occurred, nor had any horse been frightened by the blowing of this whistle, although witnesses proved that horses had passed while it was being used, and no one seems to have ever regarded it as a public or other nuisance, or calculated or likely to frighten horses.

In fact, the happening of the accident in itself seems to be relied on, as if on the principle of "*res ipsa loquitur*."

There were factories in the village also provided with steam whistles, used with far greater liberality than that of the water-works.

As to its tone, it was rather a deep bass or hoarse note, and in the estimation of one witness, at least, was less likely to frighten a horse than the high, sharp, shrill whistle of a locomotive.

If the plaintiff be entitled to succeed on the evidence adduced, a very far reaching principle of law will seem to be established.

Most cities and towns are liberally provided with factories, mills, and other establishments provided with steam whistles, used daily, and sometimes three or four times daily, for various requirements of business, such as calling men to work, or to cease working, etc., etc. So also as to ferry boats, steamers, etc., signifying their arrival or departure.

I am not prepared to hold that the mere fact of a horse

taking fright at the blowing of a steam whistle in the fair exercise and course of ordinary business, close to a public highway, is of itself at once sufficient to establish an actionable wrong for damages caused by such taking fright.

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I think in all such cases the evidence should go further than in the case before us. It should at least shew that the thing complained of was likely to cause horses to shy. The case of *Brown v. Eastern and Midlands R. W. Co.*, 22 Q. B. D. 391, bears on this question. The defendants placed a heap of earth and refuse on their land adjoining the highway, and the plaintiff alleged that his horse shied at it, and that they allowed it to run on so as to be a public nuisance to persons using the road, and upon this issue was joined. The trial Judge nonsuited and refused evidence that other horses had shied at it.

The Divisional Court held such evidence proper, and the Court of Appeal affirmed their decision. Stephen, J., giving judgment in the Divisional Court, said: "If a person erect on his own land anything whatever calculated to interfere with the convenient use of the road, he commits a nuisance * *. If, therefore, this heap was of such a nature as to be likely to cause common horses to shy it was a public nuisance. Whatever, therefore, shewed it to be likely to cause horses to shy was evidence for the plaintiffs * *. When the question is whether the particular act is a public nuisance, it is difficult to see how it can be proved to be so except by shewing cases in which it has interfered with a public right."

I think the case before us is deficient in this kind of proof, and beyond the happening of the accident there is nothing to prove its character as a nuisance to the highway.

The learned Judge in his very careful judgment considers that in his opinion it was well designed to frighten horses. But with much respect it must be said that no evidence was produced to prove this conclusion. As already noticed, this is on the *res ipsa loquitur* principle.

If the same thing had happened to a horse passing one of the other steam whistles in the Lucknow factories, if

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close to the highway, this decision would suffice to prove liability.

I can see no proof of any unreasonable or negligent or unnecessary use of this steam whistle to bring the case within the law of such cases as *Manchester, etc., R. W. Co. v. Fullarton*, 14 C. B. N. S. 54.

I am unable to agree with the learned Judge in his application of the well-known principle of *Fletcher v. Rylands*, L. R. 1 Exch. 265; 3 H. L. 330. I can hardly apply it to the effect of a loud sound on defendants' premises causing a passing horse to shy.

If steam escaping from this whistle or from any machine on defendants' land had penetrated into plaintiff's premises doing damage, or enveloped him or his horse in hot vapour or steam to his injury, I can conceive *Fletcher v. Rylands* being urged in support of liability. I think his view of that case largely influenced his Honour's decision.

It is not easy to formulate any hard and fast rule to govern such a case as the present, but I think the evidence here falls far short of rendering the defendants liable, and that there was no sufficient proof that anything done by the defendants was in the nature of a nuisance impairing the usefulness of the highway to persons passing with their horses along the same.

If the plaintiff has shewn enough here to enable him to recover, I do not see where to limit the claim.

If the corporation had their town hall or drill shed, etc., adjoining the highway, and at an excited political or other meeting a great shout, or "thunders of applause," as the newspapers describe it, had gone up from the assembled citizens, and a passing horse had taken fright and caused damage, it could be urged that there was sufficient to warrant a recovery. That the unwonted noise caused the animal to take fright may be true, but I think something more is necessary, some evidence to shew a nuisance or injury to the legal user of the highway.

I think that the appeal should be allowed.

OSLER, J. A. :—

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J.A.

It is unnecessary to consider whether the principle of *Fletcher v. Rylands*, L. R. 1 Exch. 265 ; 3 H. L. 330, applies to an action of this kind. That case decided that a person who for his own purposes brings on his land, or collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape.

Powell v. Fall, 5 Q. B. D. 597, was clearly a case of that kind, for there the defendant was the owner of a traction engine which he was using on the highway, from which sparks escaped and set fire to the plaintiff's stack of hay on a neighbouring farm. The engine was a dangerous machine, and though it was not unlawful to use it on the highway and the defendant was not negligent in its management he was liable for the damage caused by the fire which actually escaped from it into the plaintiff's property.

It is simpler and more natural to say that the true ground of the defendants' liability in a case like the present is, that by placing and using on their own land something that was calculated to interfere with the convenient use of the adjoining highway, they were guilty of a nuisance to the highway. Their liability cannot be placed on any higher ground than if they had done the act complained of on the highway itself.

Thus in *House v. Metcalf*, 27 Conn. 631, (1858), the defendant was sued for maintaining a large uncovered water wheel close to the highway at which while revolving the plaintiff's horse took fright, and the plaintiff was thrown out of his carriage and injured.

In *Knight v. Goodyear's India Rubber Co.*, 38 Conn. 438, (1871), the action was for using in the defendant's factory adjoining or near to the highway a steam whistle of such a character as to frighten horses of ordinary gentleness when passing along the highway.

In *Watkins v. Reddin*, 2 F. & F. 629, an action was

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maintained by a person who had sustained an injury through his horses being frightened by a traction steam engine used on a highway, the jury finding that the engine was likely to frighten horses.

In *Brown v. Eastern and Midlands R. W. Co.*, 22 Q. B. D. 391, the defendants had placed on their own land, adjoining the highway, a heap of earth and rubbish. The plaintiff's horse shied at it and his cart was upset and the plaintiff injured. It was held that if the heap was of such a nature as to be dangerous by causing horses passing on the highway to shy it was a public nuisance.

In all these cases, except the last, evidence was given to prove the usual effect, upon horses of ordinary character, of the things alleged to be a nuisance, for the purpose of shewing that it was in fact a nuisance, in other words, as the Court say in *Hill v. Portland, etc., R. W. Co.*, 55 Me. 438, a similar case, "to shew to the jury, some of whom might never have heard such a whistle, the nature, extent, and characteristics, of the sound emitted, and its effect upon horses of ordinary gentleness. We think (it is added) that the defendants might have proved, if they could, that the whistle had been in use for years, and that no horse had ever been alarmed by it; and so, as bearing on the same points, the plaintiff might shew what effect had actually been produced by it on horses."

In *Brown v. Eastern and Midlands R. W. Co.*, the plaintiff was nonsuited, and the Judge, in the course of the trial, excluded evidence to shew that after placing the heap of rubbish on the ground several horses passing the place shied at it. The Court in setting aside the nonsuit say: "If therefore this heap was of such a nature as to be likely to cause common horses to shy it was a public nuisance. Whatever, therefore, shewed it to be likely to cause horses to shy was evidence for the plaintiffs. * * When the question is whether the particular act is a public nuisance, it is difficult to see how it can be proved to be so except by shewing cases in which it has interfered with a public right."

In all such cases something more must be shewn than the mere occurrence of the accident. What the defendants have done is *prima facie* not unlawful; there must be evidence of its dangerous character, shewing its effect upon horses of ordinary steadiness, before it can be said to be a public nuisance, and that evidence was wanting here. I think this is the result of the authorities I have mentioned, and I may refer to the most recent case I have been able to find on the subject: *Galer v. Rawson*, [1889] W. N. 180; 6 Times L. R. 17. This was also a case of injuries sustained by reason of a horse taking fright at a traction steam engine on a public highway. The jury found that the accident was caused by the horse taking fright at the engine when lawfully on the road and properly managed. The note of the case is that there was no evidence that the engine was a nuisance except in the fact that it had frightened the plaintiff's horse; and, *per* Esher, M. R., that the fact that the engine was a nuisance must be proved by evidence; and that there was no such evidence in the case. The report in the Times Law Reports is fuller, and this observation of the Master of the Rolls is not in terms found there, but its substance is found in his judgment and in those of the Lord Justices.

Judgment.

 OSLER,
J. A.

I think the plaintiff here fails also to shew that the use of the whistle on the occasion in question was a wanton or unnecessary act, done out of the usual course of business, so as to bring the defendants within such cases as *Manchester, etc., R. W. Co. v. Fullarton*, 14 C. B. N. S. 54; *Stott v. Grand Trunk R. W. Co.*, 24 C. P. 347. I should myself have been disposed to attribute the accident to the want of ordinary care on the part of the plaintiff's servant in managing the horse, but it is unnecessary to turn the case on that ground. On the whole, I have to agree in allowing the appeal.

A large number of cases on the subject of nuisance to a highway are collected in the recent case of *Barber v. Penley*, [1893] 2 Ch. 447.

Judgment. MACLENNAN, J. A.:—

MACLENNAN,
J.A.

The question is, whether it is an actionable wrong by some negligent act to frighten a horse so that he runs away and causes damage; and it is established by abundant authority that it is. I refer to the following English cases: *Manchester, etc., R. W. Co. v. Fullarton*, 14 C. B. N.S. 54; *Hill v. New River Co.*, 9 B. & S. 303; *Harris v. Mobbs*, 3 Exch. D. 268; *Wilkins v. Day*, 12 Q. B. D. 110; *Simkin v. London and North-Western R.W. Co.*, 21 Q. B. D. 453, and *Brown v. Eastern and Midlands R. W. Co.*, 22 Q. B. D. 391.

In *Manchester, etc., R. W. Co. v. Fullarton*, the driver of a railway engine while near a highway crossing, blew off steam from the mud cocks of the engine so that the plaintiff's horses were enveloped therein and frightened.

In *Hill v. New River Co.*, the defendants caused a stream of water to spout on the highway to a height of about four feet above the level of the road, and left it unguarded, by which the plaintiff's horses were frightened.

Harris v. Mobbs, was the case of a steam plough and van left standing on the highway over night, by which a horse was frightened; and in *Wilkins v. Day*, a horse was frightened by an agricultural roller similarly left on the highway. The cases just mentioned, were all cases of something placed or done upon the highway itself.

Brown v. Eastern and Midlands R. W. Co., was the case of a heap of rubbish placed, not on the highway, but on adjacent ground, and the defendants were held liable for damage caused by horses shying at it, just as if it had been on the soil of the highway itself.

Besides these English cases, there are the following in our own courts: *Stott v. Grand Trunk R. W. Co.*, 24 C. P. 347; *Howe v. Hamilton and North-Western R. W. Co.*, 3 A. R. 336; *Rosenberger v. Grand Trunk R. W. Co.*, 8 A. R. 482; 9 S. C. R. 311; *Chandler Electric Co. v. Fuller*, 21 S. C. R. 337, and *Connell v. Prescott*, 20 A. R. 49, affirmed in the Supreme Court.

In *Stott v. Grand Trunk R. W. Co.*, the plaintiff's horse was frightened by steam let off unnecessarily and negligently from an engine standing on the company's own land near a crossing, while the plaintiff was passing along the highway. Judgment.
MACLENNAN,
J.A.

In *Howe v. Hamilton and North-Western R. W. Co.*, the defendants were held not liable in a similar case, because they did not act negligently, but it is clearly recognized in the judgments, that if negligence had been proved, the defendants would have been liable.

In *Rosenberger v. Grand Trunk R. W. Co.*, the horses were frightened by the passing of a train across a highway, and the company were held not liable, having given the statutory warning by bell or whistle before doing so.

Connell v. Prescott, was a case in which horses standing in a lumber yard near a highway, were frightened by the noise of stones falling on a shed under or near which the horses were at the time, the stones having been thrown into the air by a blast of rock set off by the defendants in excavating a sewer on the street.

I think these cases clearly shew that it is an actionable wrong to frighten a horse by a negligent act, whether the act be done upon the soil of a highway or upon adjacent land; and whether the act complained of be in the nature of a public nuisance or not. The essential thing is negligence. The degree of care which is required, may vary according to circumstances. The owner of a steam plough and van may carry them along a highway in the ordinary course of his business, without being responsible for the alarm their unusual appearance may excite in spirited horses; but he may not unnecessarily leave them standing on the road; and the same is true of an agricultural roller. The reason is that the owners of such implements have a right to use the highway to carry them from place to place, using reasonable care in so doing; but they have no right to use the highway, as it were, for a place of storage. So also railway companies usually have statutory authority to use steam engines and to cross high-

Judgment.
MACLENNAN,
J.A. ways with them, and to run parallel to them; and they are not responsible for the terror excited by the appearance or noise of their engines in the ordinary and reasonable use of their powers. But for statutory authority, such companies would be liable for damage independently of actual negligence.

In *Jones v. Festiniog R. W. Co.*, L. R. 3 Q. B. 733, a case afterwards approved of by the House of Lords, Lord Blackburn says: "The general rule of common law is correctly given in *Fletcher v. Rylands*, that when a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril, and is liable for the consequences if it escapes and does injury to his neighbour. Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engines from doing injury, and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shewn on their part."

It was not shewn or even contended that the defendants in this case had any statutory authority to use a steam engine or a steam whistle; and I am unable to see any ground on which they can claim to be exempt from the rule of the common law thus stated by Lord Blackburn. The learned Judge of the County Court, in his able judgment, states his opinion to be that the case is governed by the principle of *Fletcher v. Rylands*, cited by Lord Blackburn, and I agree with him; and it follows that the defendants were bound to see that the use of steam by them did no harm to persons lawfully using the highway.

It was not and could not be disputed that it was the steam whistle which frightened the plaintiff's horse and caused the accident. The whistle was a very loud one, and the sudden outburst of steam, and the very loud and piercing noise which accompanied it, within a very few feet of the highway, were calculated to startle passing horses; and it was the clear duty of the defendants, in my opinion, before using their whistle, to look up and

down the road, and to see that no horses were passing. If sparks from their engine had set fire to a passing load of hay, their liability would be beyond question ; and I think no distinction can be drawn between such a case and the present. No doubt, when it is a question of sight or sound, it is a question of degree ; but I think the evidence fully supports the finding of the learned Judge in this case that the use of the defendants' whistle was likely to do the mischief, which was actually done.

Judgment,
MACLENNAN,
J.A.

It was strongly contended by Mr. Garrow that the plaintiff's driver had been guilty of contributory negligence in driving a stallion along the road with a loose rein. On this point also, I agree with the learned Judge. The driver had no warning ; no reason to expect the whistle to be blown, so as to be specially on his guard, and the character of his horse was such as not to require special watchfulness. There was, therefore, no negligence on his part contributing to the accident, to relieve the defendants from their responsibility.

I am, therefore, of opinion that the appeal should be dismissed.

Appeal allowed with costs,
MACLENNAN, J. A., *dissenting.*

BERRY V. DONOVAN.

Attachment—Contempt of Court—Payment of Money—R. S. O. ch. 67, sec. 6—Practice—Rules 878 et seq.

Section 6 of R. S. O. ch. 67, which abolishes process of contempt for non-payment of any sum of money payable by a judgment or order, refers to payment of money as between debtor and creditor; and defendants who are, by judgment, directed to procure the discharge of an encumbrance wrongfully placed by them on the plaintiff's lands may be attached for failure to comply with the judgment, although payment of money may become necessary to effect what is required.

Male v. Bouchier, 1 Ch. Ch. 359; 2 Ch. Ch. 254, overruled.

But where the judgment directs the act to be done within a limited time the defendants cannot be attached unless the judgment, with the proper notice of the penalty for default, has been served upon them in time to give them a reasonable opportunity of complying with its terms before the expiration of the prescribed period; MEREDITH, J., dissenting on this point.

Judgment of BOYD, C., reported (*sub. nom. Roberts v. Donovan*) 21 O. R. 535, affirmed on other grounds.

Statement.

THIS was an appeal by the plaintiff from the judgment of BOYD, C., reported (*sub nom. Roberts v. Donovan*) 21 O. R. 535, refusing an application for the committal of the defendants.

The action was brought by Eliza Roberts against Joseph A. Donovan, a barrister and solicitor, his wife, Julia Donovan, and Frederick B. Hayes, to have a conveyance of certain lands made by Roberts to Hayes, as trustee for Julia Donovan, set aside as having been obtained by the fraud and undue influence of Joseph A. Donovan, or to have it cut down to a conveyance of her life estate only, and to compel the defendants to procure a discharge of a mortgage of the lands made by them in favour of one Robert Beaty. The action came on for trial on the 22nd of May, 1890, and after some evidence had been given, judgment was entered by consent, directing the conveyance to be reformed "so as to read as a conveyance of the plaintiff's life estate only," and ordering the defendants, within three months from the date of the judgment, to cause the mortgage to Beaty to be discharged, save as to the life estate.

The defendants did not procure the discharge of the

mortgage as required, and shortly after the judgment, Statement.
on the 5th of June, the defendant Hayes made and registered another mortgage in fee upon the same lands to one Hugo Block, to secure \$520 with interest at two per cent. per month; and this mortgage was witnessed by Donovan. Afterwards, on the 17th of June, an assignment of the Beaty mortgage was made by Beaty to one Gallow, by an instrument to which Donovan was a party, and in which he covenanted with the assignee that the money due and owing on the mortgage with all accrued interest, would be paid at maturity. On the 16th of November, 1891, the plaintiff died, nothing having been done, either in the way of performing the judgment by the defendants, or enforcing it by the plaintiff. On the 15th of December, 1891, the action was revived in the name of Ann Berry, as executrix of the original plaintiff, and the order of revivor, with the usual notice endorsed thereon, was personally served on all the defendants; on Hayes on the 17th of December, on Joseph A. Donovan on the 21st of December, and on Julia Donovan on the 4th of February, 1892. The judgment was also served on the defendants for the first time on the same days as the order of revivor, but notice requiring obedience to the judgment was not served on any of the defendants; nor was any order obtained fixing any further day or time for causing the mortgage in question to be discharged.

An application was then made for the committal of the defendants, but it was refused by the learned Chancellor, who felt himself bound by the decision of the late Chief Justice, then Vice-Chancellor, Spragge, in *Male v. Bouchier*, 1 Ch. Ch. 359.; 2 Ch. Ch. 254.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, J.J.A., and MEREDITH, J., on the 26th and 27th of September, 1893.

Moss, Q. C., and *Hoyles*, Q. C., for the appellant. The learned Chancellor followed *Male v. Bouchier*, 1 Ch. Ch. 359,

Argument. 2 Ch. Ch. 254, but that case does not apply, and was at any rate not rightly decided. The application there was *ex parte*, and the point was not fully considered. The question really is as to the meaning of 22 Vic. ch. 33, sec. 4, by which process of imprisonment for contempt for non-payment of money was abolished, and the remedy by execution substituted. Clearly this was intended to apply merely to money payable as such. The process of contempt struck at was the old *ex parte* application for attachment on shewing mere non-payment, and for this execution was substituted. The decisions under the English Statute, 32 & 33 Vic. ch. 62, sec. 4, abolishing attachment, throw light on the interpretation that should be given. Its terms are very much wider than those of our Act, and yet attachment has been granted in cases like the present, and it has been held that the Act is confined to non-payment of debts: *Snow's Practice*, [1893] p. 745; *Bates v. Bates*, 14 P. D. 17; *Lynch v. Lynch*, 10 P. D. 185; *Pritchard v. Pritchard*, 18 O. R. 173; *Harvey v. Hall*, L. R. 11 Eq. 31.

A. C. Macdonnell, for the respondent Hayes. The respondent Hayes was trustee, and acted under the professional advice of his co-defendant. He has no means and is unable to pay the mortgage. This judgment in effect directs the payment of money, and *Male v. Bouchier*, 1 Ch. Ch. 359, 2 Ch. Ch. 254, governs the case. The words of our Act are perfectly plain, and the English cases, dealing with an Act differently worded, do not apply. In *Lynch v. Lynch*, 10 P. D. 183, the person in contempt had the means of complying. In *Bates v. Bates*, 14 P. D. 17, there is the same distinction. In *Harvey v. Hall*, L. R. 11 Eq. 31, there was non-disclosure of the receipt of the moneys in question. Committal is a matter of discretion, and an appeal will not lie from a judgment refusing committal: *Millar v. Macdonald*, 14 P. R. 499; *Crowther v. Elgood*, 34 Ch. D. 691; *Preston v. Etherington*, 37 Ch. D. 104. Moreover, the judgment was not served till more than a year and a half after its date, and it was too late then to enforce it: *Duffield v. Elwes*, 2 Beav. 268; *Adkins v. Bliss*, 2 DeG. & J. 286; *Australian*

Automatic Weighing Machine Co. v. Walter, [1891] W. N. Argument. 170; *Wagner v. Mason*, 6 P. R. 187; *McAvilla v. McAvilla*, 6 P. R. 311. Ability to pay has not been shewn, and this must be done before committal will be ordered: *Marris v. Ingram*, 13 Ch. D. 338; *Holroyde v. Garnett*, 20 Ch. D. 532. There was no notice of the penalty for noncompliance.

J. A. Donovan, for himself and his co-respondent, Julia Donovan, argued on the same lines.

Hoyles, Q. C., in reply. An appeal will lie from an order refusing to commit, though where the refusal is based upon the exercise of discretion, the Appellate Court would be very slow to interfere. Here no discretion was exercised. The cases cited by the respondents are cases where discretion was exercised. Nor is service before the time limited a condition precedent. In *Wagner v. Mason* and *McAvilla v. McAvilla*, the orders had never been served at all, and besides these were orders made on interlocutory applications, and under the old Chancery practice greater strictness was necessary, as *ex parte* orders for committal could be obtained. No notice of penalty for noncompliance is necessary under our practice: *Holmested and Langton*, p. 711. It is different under the English Rule: *Snow's Practice*, [1893] p. 741. But this rule is not in force here, and nothing need be shewn but notice of the order and notice of the application.

December 22nd, 1893. HAGARTY, C. J. O. :—

Apart from objections to the regularity of the plaintiff's proceedings to attach, on which the defendants rely to support the judgment, which will be afterwards considered, we must notice the main question as to the power to commit for disobedience to the judgment.

The principal question may be thus stated :—The defendants are ordered to cause a certain mortgage to be discharged; this, it is alleged, can be only done by paying a large sum of money; and it is, therefore, in effect, an

Judgment. order to pay money, and thus within the statute. The
HAGARTY, plaintiff denies this, and insists that it is her only remedy,
C.J.O. as the relation of debtor and creditor does not exist between her and the defendants, and that therefore the statute does not apply.

The statute of Canada of 1859, 22 Vic. ch. 33, recites that it is expedient to extend to decrees in Chancery and to rules and orders of the Law Courts, the relief granted to parties under the Act for the abolition of imprisonment for debt; and section 4 abolishes process of contempt for nonpayment of any sum of money, etc., and section 12 provides that for the purpose of enforcing payment of money or costs payable by any decree or order in Chancery or of the common law Courts, writs of *fi. fa.* shall be granted: and section 14 makes such decrees or orders of the same force as a judgment.

This Act is consolidated as chapter 24 of our Upper Canada Consolidated Acts; section 13 in effect repeats section 4 of 22 Vic. ch. 33, abolishing process of contempt; and section 15 gives decrees and orders the effect of judgments; and by section 19, *fi. fa.*'s. may issue thereon by "the person to receive payment."

To the same effect is R. S. O. (1877) ch. 67.

And again, in R. S. O. (1887) ch. 67, with the necessary changes consequent on the Judicature Act, in substance the same language is used.

The Imperial Act of 1869, 32 & 33 Vic. ch. 62, declares generally that no person shall be arrested or imprisoned for making default in payment of a sum of money, with some large exceptions as to penalties, moneys recoverable summarily on magistrate's orders, etc.; default by trustees and others in a fiduciary capacity; default by solicitor in paying costs ordered for misconduct, or in his character of an officer of the Court, etc.

In this case the learned Chancellor acted, I may say, solely on the authority of *Male v. Bouchier*, 1 Ch. Ch. 359, 2 Ch. Ch. 254.

Neither before him nor before Vice-Chancellor Spragge,

was the question discussed as it has been before us. In the earlier case there is no reported discussion—nothing beyond the expression of opinion that the statute prevented the issue of attachment or committal of an executor under a will directing a certain purchase to be completed for the benefit of the plaintiff, and who, although having sufficient moneys in hand to complete the same, failed or refused so to do.

Judgment.

HAGARTY,
C.J.O.

The report is very meagre.

I feel very great difficulty in accepting this decision as governing the case before us for judgment.

I cannot read our statute law as governing the case.

I read the law as abolishing process against the person, so far as to place all orders for payment by a debtor on the footing of judgments, on which the ordinary remedy of execution could issue.

Formerly every order in Chambers on which costs were to be paid by one party to another, could be enforced by attachment, and so in equity, where the order or decree directed the payment of money or costs to a plaintiff.

All this has been altered, and the person claiming the money or costs, is enabled to enforce payment by *fi. fa.*, etc.

But it seems to me that the whole scope and design of the Legislature is confined to the dealings between creditor and debtor—that such a case as this directing defendants to remove an encumbrance improperly placed by them on the plaintiff's property, is not within the law.

I think our statute and the Imperial Act of 1869, are substantially alike in the class of cases in which process of contempt is abolished.

In *Lynch v. Lynch*, 10 P. D. 183, Lord Hannen held that attachment might go against a husband (respondent) for not paying or giving security for his wife's (petitioner) costs, notwithstanding the Act of 1869.

In *Bates v. Bates*, 14 P. D. 17, the wife petitioned for judicial separation; the husband (respondent) was ordered to pay the costs incurred, and to pay into Court £40, or

Judgment.

HAGARTY,
C.J.O.

give security for the wife's costs. In default, an order for committal was made by Butt, J., and the husband appealed.

In the Court of Appeal, Cotton, Lindley, and Bowen, L. JJ., approved of *Lynch v. Lynch*, and dismissed the appeal as to the payment into Court or giving security. Cotton, L. J., points out the distinction as to the Act of 1869. He says: "In my opinion the order for attachment was not in violation of the Debtors' Act, because it was not for default in payment of a sum of money within the meaning of that section. The object of the Act was to prevent imprisonment of persons for nonpayment of ordinary debts. No doubt the words used in the Act are very wide, but we must consider what was really meant by the payment of a sum of money. This order was not for the payment of a sum of money to the respondent; nor was it simply an order for the appellant to pay a sum of money into Court; but there was an alternative, he was either to pay the money or to give a bond. * * The order was an order to give security, and as such was not within the fourth section of the Debtors' Act."

I may also refer to the judgment of my brother MacMahon in *Pritchard v. Pritchard*, 18 O. R. 173, where reference is made to the Consolidated Rules.

There is not much to be gathered from the Rules.

Rule 880:—Provides that if any person ordered, otherwise than by an order of course, to do any act other than to pay money in a limited time refuses or neglects to obey the judgment or order according to the exigency thereof, the party prosecuting the same shall be entitled to a writ or writs of attachment against the disobedient party; and by Rule 881, if the person be so arrested without obedience, the party prosecuting the same shall have a writ of sequestration against the estate and effects of the disobedient party.

On the whole, I am respectfully of opinion that the decision appealed from cannot be supported, on the ground there taken as to the effect of the law to abolish attachment for nonpayment of money.

There is no payment here to be made as between creditor and debtor. An order is sought to compel a person, not a debtor to plaintiff, to redress a most serious wrong by removing an improper encumbrance on the plaintiff's land.

Judgment.

HAGARTY,
C.J.O.

I think it would paralyze the powers of the Courts to compel restitution or remove clouds on title and a hundred other wrongs, if they are all to be solved by classing them as orders for the payment of money. The fact that the alleged wrongdoer may not be able to redress the wrong without some expenditure or payment of money to somebody else, cannot, in my opinion, prevent the action of the Court by way of attachment or committal.

No other remedy would seem to be open to this plaintiff except this recourse against the persons of the wrongdoers. It will be observed that the disobedience to the decree in the present case was most marked, and that within about a month from its date the mortgage which was ordered to be discharged was assigned to one Gallow. The defendant Donovan became an executing party thereof, covenanting as owner of the property that principal and interest should be duly paid at maturity.

And it also appeared that within the same short period, the defendant Hayes executed another mortgage upon part of the same premises to one Block with a covenant for title in fee subject to Beaty's mortgage, the defendant Donovan being the subscribing witness.

I am of opinion that if the proceedings had been free from objection or irregularity it would seem to be a proper case for the interposition of the Court by process of attachment or committal to compel obedience against the defendants or some of them. I do not consider that the fact of the charges of fraud not being pressed on the defendants consenting to the decree, can affect the aspect in which such a case as this has to be viewed.

It remains to consider the regularity of the proceedings, as it is open to the respondents to uphold the decision appealed from on other grounds.

Judgment.

HAGARTY,
C.J.O.

Three months were fixed by the decree for procuring the discharge of the mortgage. This period had long passed before any attempt to enforce obedience, and no reason is assigned for the delay. The practice is thus stated in 1 Daniell, 5th ed., 904: "When the decree or order names a specific day for doing the act, and does not merely limit a time after service for that purpose, it must be served before the day named; or if the service cannot be effected before that day, an application must be made, by special motion or summons, for an order enlarging the time, or fixing a new period, where the time appointed has expired. A copy of such supplemental or further order must be endorsed and served, in like manner as in the case of the original order." *Adkins v. Bliss*, 2 DeG. & J. 286; *Duffield v. Elwes*, 2 Beav. 268, are authorities for this.

Here the time elapsed and in addition the decree had not been served till long after.

Then there was the death of the plaintiff before any steps taken: then the order for revivor obtained *ex parte*.

Not till after this order was obtained was the decree served on any of the parties.

It certainly appears from the practice that service of the decree or order must be made for the purpose of putting a defendant in default.

The allowing the time fixed to elapse without any steps would seem to be wrong.

The Court would, we have no doubt, on a proper application, enlarge the time or appoint a new time, and within such time the necessary steps should be taken.

In Daniell, at p. 905, it is stated how the decree or order should be properly served.

I think it impossible to uphold the regularity of these proceedings, and that the appeal must fail thereon.

OSLER, J.A. :—

On the argument of this appeal, I said that it appeared to me that the plaintiff's proceedings to attach the defendants were open to a serious objection, on the score of

irregularity, viz., that the consent decree, even if drawn up and issued within the time fixed thereby for the performance of the act directed to be done, had not been served within that time, nor for many months afterwards. The common sense of the thing requires that a party who has obtained a decree, compliance with which he intends to enforce by attachment or committal, shall serve it upon the party affected thereby, or upon his solicitor, where such a mode of service for that purpose is authorized. That is the proper and natural way of bringing home the decree to the notice of his opponent, and of shewing that it is not a dead letter, or abandoned. Equally reasonable is it that this should be done before the expiration of the time fixed for the performance of the act, when the decree fixes or limits such a time. This was the practice before the Judicature Act, and I find no authorities to shew that it has been altered, or that it is unreasonable or opposed to the spirit of the modern practice. Indeed, the case of *Treherne v. Dale*, 27 Ch. D. 66, is an express decision the other way. I refer also to *In re Holt*, 11 Ch. D. 168, and *Thomas v. Palin*, 21 Ch. D. 360. There is no such difference in the language of our Rules 878, 879 and 880, as to render these cases inapplicable.

Judgment,

OSLER,
J.A.

The plaintiff must therefore move to have a new day fixed for the discharge of the mortgage. I cannot conceive how there can be any difficulty in doing so, because the substantial thing consented to and decreed remains; the time limit can only be regarded as a matter of convenience to the defendants where the plaintiff shews by service that he means to enforce the decree.

On the merits of the application, viz., whether a decree of this kind can be enforced by attachment or committal, we ought, I think, under the circumstances, to express an opinion. The learned Chancellor naturally felt bound by, and followed, the judgment of his predecessor, in the case of *Male v. Bouchier*, 1 Ch. Ch. 359; 2 Ch. Ch. 254, which, so far as we can gather from the report, is a decision that such a decree as that now in question is in effect a decree

Judgment.

**OSLER,
J.A.**

for the payment of money within the meaning of R. S. O. (1887) ch. 67, sec. 6, and not therefore enforceable by attachment.

That section enacts that, "Process of contempt for non-payment of any sum of money payable by a judgment, etc., is abolished."

This enactment, by its very terms, is confined to a judgment for the payment of money. The object of the original enactment was to abolish the remedy by attachment for contempt in such case, and was *in pari materia* with the alteration of the law which took place at the same time in the practice of arresting for debt, and in the mode of enforcing judgments and decrees of the Court of Chancery for the payment of money.

There would have been little use in making special provision for the mode of issuing a *capias ad satisfaciendum* or in enabling the Court of Chancery to enforce its decrees for payment of money by means of a *fi. fa.* or other similar common law execution if such judgments could still be enforced by means of attachment. I think the judgment or order which the 6th section and its predecessors dealt with were judgments for payment of money *inter partes*, which would be satisfied by payment of money by the one to the other.

A judgment, decree, or order by which a person is required to do some act, whether it be to execute, or to procure the execution of, a deed or of a discharge of mortgage, though it may involve the payment of money to some one other than the opposite party, is not, in my opinion, a judgment, decree, or order within the Act, and it would be difficult to suggest any mode of enforcing such a judgment if it cannot be enforced by attachment or committal in the suitable case for disobedience to the command of the Court: Consol. Rules 874, 880.

The case of an order to pay money into Court is specially provided for, I think very unfortunately, by Consol. Rule 883, which enables the party prosecuting the order to obtain a writ of sequestration against the defaulting

party. I think it was a mistake which the Legislature at all events did not fall into, to abrogate—if indeed that be the effect of the Rule—the power of the Court to commit or attach for disobedience of an order to pay money into Court, or for the default of an officer of the Court, solicitor or sheriff, in paying into Court moneys in his hands.

On the ground of the irregularity in the plaintiff's proceedings the appeal must be dismissed. It is certainly not a case for costs.

Judgment.

OSLER,
J. A.

MACLENNAN, J. A. :—

The first question is whether the present case is governed by *Male v. Bouchier*, 1 Ch. Ch. 359 ; 2 Ch. Ch. 254. In that case the decree directed an executor to complete a purchase made by the testator in his life time, within a week, and to convey to the plaintiff within a further period of a month. It was shewn that the time for completion of the purchase had expired ; that sufficient funds had come to the hands of the executor to enable him to do so, and that there was no obstacle in the way of its payment, but payment had not been made. The Vice-Chancellor held that the default consisted in the non-payment of money, and that the defendant could not be committed. I think this is a very different case. The mortgage to be discharged was not due, and would not be due within the three months limited for its discharge by the judgment. The mortgagee was not obliged to accept payment before maturity, and the plaintiff was not by the terms of the judgment obliged to wait till then. Moreover, the mortgage was not to be discharged in the ordinary sense of being paid. What was to be done was to procure the mortgage title to be reduced or cut down from an estate in fee to an estate *pur autre vie*, for the life of the plaintiff ; and I do not see how that could be done by the indirect method of issuing an execution against the defendants even if the full amount of the mortgage debt were levied by execution. I am, therefore, clearly of opinion

Judgment.
MACLENNAN, that if the original plaintiff had proceeded to enforce her
J. A. judgment in her life time, and before the mortgage debt
had fallen due, the defendants could not have successfully
resisted a motion for an attachment, even if *Male v. Bouchier* was well decided.

But it may be contended that the condition of things when the motion was made ought to be regarded, and that at that time the mortgage had become due, and the life estate had come to an end, so that it had become a case precisely like *Male v. Bouchier*, and one in which the judgment could be obeyed by the mere payment of money. That is certainly a formidable objection and seems to make it necessary to review that case. All the decisions of the late learned Chief Justice are entitled to great respect, but this was a decision in Chambers, and seems not to have been very fully argued before him. The case arose in 1865, and the Act which governed it was C. S. U. C. ch. 24, which was mainly a consolidation of the Act 22 Vic. ch. 33. The clauses which were pertinent were sections 13, 15, 19 and 20. Section 13 abolished "process of contempt for nonpayment of any sum of money * * payable by any decree or order of the Court of Chancery, or of a Judge thereof." Section 15 enacted that "every decree or order of the Court of Chancery * * directing payment of money * * shall so far as it relates to such money * * be deemed a judgment, and the person to receive payment a creditor, and the person to make payment a debtor within the meaning of the Act." Section 19 enacted that "for the purpose of enforcing payment of any money * * payable by any decree or order of the Court of Chancery * * the person to receive payment shall be entitled to writs of *fieri facias* * * against the property of the person to pay, and shall also be entitled to attach and enforce payment of the debts of or accruing to the person to pay, in the same manner respectively, and subject to the same rules, as nearly as may be, as in the case of a judgment at law, in a civil action." And section 20 provided that "in

case a decree or order in Chancery * * directs the payment of money into Court or to the credit of any cause, or otherwise than to any person, the person having the carriage of the decree or order, so far as relates to such payment, shall be deemed the plaintiff within the meaning of the Act." Now the learned Chief Justice in his brief judgment does not discuss or expound these clauses, but merely says he thinks that if he were to order the defendant to be committed, it would be in reality for non-payment of money, and that he should contravene the statute; and he thought the real disobedience of the decree was nonpayment of the money.

Judgment.

MACLENNAN,
J.A.

I think if the attention of the Chief Justice had been directed to the other three clauses of the Act, as well as to the one which abolishes the process of contempt, his judgment would have been different. Section 13 takes away the old remedy by process of contempt, and section 19 substitutes another in its place. The two sections must be read together, and when we do that, it is evident that the decrees for payment of money mentioned in section 13, are those in which a *fi. fa.* could be issued, and in which the debts due to the debtor could be garnished in the same manner as in a judgment at law in a civil action.

The Legislature did not intend to leave any case without remedy. The cases in which the process of contempt is taken away, were those and those only in which it was possible at once to issue a *fi. fa.*, and also to attach the debts of the debtor, the same as at law.

In order to entitle a plaintiff at law to issue a *fi. fa.* his judgment had to be for an ascertained definite sum of money, and this was equally necessary to enable him to resort to the process of garnishment. The first member of this proposition requires no authority, and the other depends on section 288 of the C. L. P. Act, C. S. U. C. ch. 22, which requires, in order to obtain an attaching order, that an affidavit shall be made stating that judgment has been recovered, and is still unsatisfied, and to what amount.

Judgment.
MAOLENNAN,
J. A.

In the present case there is no sum of money whatever ordered to be paid or even mentioned. We may suppose that there was money due on the mortgage, and that by payment of money the mortgagee might be induced to reduce his mortgage title in the manner adjudged; but that is all mere speculation, and it is evident that at no time could any *fi. fa.* be issued on the judgment, nor could any process of garnishment be founded thereon.

I think the mind is led to the same conclusion by the other sections of the Act, which I have quoted, viz., 15 and 20. These sections shew just how far the Legislature intended to go in doing away with the old Chancery process, and substituting therefor the common law process. They extend it to all cases in which the judgment is in terms for an ascertained sum of money, and they put orders of Court on the same footing in that respect as judgments and decrees. The language of section 20, which extends the new practice to other sorts of cases, is very plain; it is in case a decree or order directs the payment of money into Court, or to the credit of any cause, or otherwise than to any person.

I think, therefore, that, as the law stood upon the Consolidated Statute, its meaning was, that process of contempt was abolished in all cases in which a decree or order directed the payment of money, in such a way that a *fi. fa.* could immediately be issued therefor, in the event of its non-payment, and in those cases only, and that *Male v. Bouchier*, 1 Ch. Ch. 359, 2 Ch. Ch. 254, was not well decided.

Unless, therefore, there has been some adequate change in the law since *Male v. Bouchier* was decided, the present judgment cannot be supported on the merits; and I think there has been no such change in the law.

Sections 6, 10 and 11 of the present Act respecting arrest and imprisonment for debt, R. S. O. (1887) ch. 67, correspond substantially for the present purpose with sections 13, 15, and 20 of the Consolidated Statute, ch. 24, while the old section 19, which was in force until the Judi-

cature Act as section 72 of the Execution Act, R. S. O. Judgment.
(1877) ch. 66, has not been retained as an express enact- MAOLENNAN,
ment, but has been embodied substantially in the Consoli- J.A.
dated Rules. These are Rules 862, 863, 864, and 867, and
their substantial identity with the old section 19, is appar-
ent on inspection.

To make the matter still more plain, Rule 874 provides expressly that judgments requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or committal.

I think the present case is within this Rule, and not within Rule 863, and that attachment is the appropriate mode of enforcing the judgment.

It now becomes necessary to consider the objections which have been raised to the motion on the ground of irregularity.

The disobedience complained of is, that the mortgage was not discharged within three months from the date of the judgment, and the objection is, that the judgment was not served within that time, and that when it was served, no further time was limited within which it was to be obeyed.

The Rule applicable to the case is 878, which says that a writ of attachment against the person shall be issued under the same circumstances, and in the same manner, and shall have the same effect as according to the practice of the Court of Chancery prior to the Ontario Judicature Act of 1881.

I think these words "circumstances" and "manner" of issue, mean the practice and proceedings to be followed in obtaining the writ, and therefore this Rule in effect intends to retain and preserve the practice and proceedings formerly followed in Chancery. But we must read along with Rule 878 the two following, Rules 879 and 880, and the result is that the old Chancery practice, as modified by Rules 879 and 880, is now to be used.

Process of contempt involves the liberty of the subject,

Judgment. and the court always took great care that the party
MACLENNAN, against whom it was invoked had clear notice of what he
J.A. was required to do, and time and opportunity to obey, and
was without excuse for his disobedience, before the hand
of the Court was laid upon him. Therefore, the old
practice, while it allowed attachments to be issued *ex parte*, required that the order requiring an act to be done
within a limited time should be served, and that the copy
served should have a notice endorsed thereon, that in case
of disobedience within the time limited, he was, among
other things, liable to be arrested by the sheriff. After
that service the party prosecuting the order, at the expi-
ration of the time limited, upon filing an affidavit of the
service of the order, and of the nonperformance thereof,
was entitled, upon *præcipe*, to a writ or writs of attach-
ment against the disobedient party: Chancery order
288. The Chancery order requiring the notice to be en-
dorsed on the copy served was order 293. Now, the only
change which has been made is that the writ can no
longer be obtained *ex parte*. By Rule 879, it must be
applied for on notice, instead of being obtained on *præcipe*.
The new Rule 880, is in part a substitution for or repeti-
tion of the old Chancery order 288 above mentioned; but
in the face of the language of Rule 878 I cannot read Rules
879 and 880 as dispensing with the service of an
order limiting a time for performance duly endorsed with
a notice of the consequences of disobedience.

In England it was held under the Rules of 1875 that
inasmuch as an attachment could not be obtained *ex parte*
or without a notice of motion, the notice formerly required
by the Chancery practice did not need to be endorsed upon
the copy of the order which was served: *Thomas v. Palin*,
21 Ch. D. 360; and I should have felt bound by that
decision but for the words contained in Rule 878, retaining
the old Chancery practice. By the English Rule of 1883,
No. 573, the old practice was substantially restored, and
an endorsement is now required to be made as before:
Hampden v. Wallis, 26 Ch. D. 746, and *Treherne v. Dale*,
27 Ch. D. 66.

This last case is also useful as shewing what ought to have been done here in consequence of the time originally limited by the judgment having elapsed without service of the order. The plaintiff ought to have obtained an order fixing a new time within which the judgment should be performed. This was the old practice, as to which see cases collected in Wilson's Judicature Act, 7th ed., p. 337.

Judgment.

MACLENNAN,
J. A.

I am, therefore, of opinion that this judgment ought to have been served within the three months limited, with the notice endorsed on the copy served according to the old practice, and such not having been done the motion was irregular, and ought to have been dismissed for that reason.

I think the appeal must be dismissed, but without costs.

MEREDITH, J.:—

The judgment sought to be enforced by way of attachment is in these words:—

[The learned Judge read the paragraph and continued:]

Its frame and substance were the act of the parties, the judgment having been made upon consent of counsel for all parties, and in the terms of consent minutes drawn and signed by them.

Giving the fullest effect to the several enactments passed with the object of abolishing imprisonment for debt, and in dealing with the English cases always bearing in mind the narrower scope of the Imperial Acts, as indicated by the many exceptions from the general provision, as against the intended general and sweeping nature of the Provincial Acts—[see 22 Vic. (1858) ch. 96: "The Act for the Abolition of Imprisonment for Debt," and 22 Vic. (1859) ch. 33, "An Act to extend the provisions of the Act for the Abolition of Imprisonment for Debt."]—I am quite unable to perceive how a writ of attachment for noncompliance with such judgment can be held to be "process of contempt for nonpayment of any sum of money," abolished by section 6, R. S. O. (1887) ch. 67, "An Act respecting Arrest and Imprisonment for Debt," which had its origin in the two Acts before mentioned; or that that which is ordered to be

Judgment. done is not "an act other than to pay money" within the provisions of the Consolidated Rule 880; or even to consider imprisonment under it "imprisonment for debt," such as the legislation referred to was intended to abolish: whilst if "process of contempt for nonpayment of any sum of money" is to be considered as applicable only to cases in which, under Lord Coventry's orders, the whole decree need not have been recited in the writ of execution upon which the attachment was founded, but only the short form prescribed by such orders to be used if the decree was only for the payment of money, thus early making a well defined difference in the practice in the case of decrees or orders for the payment of money to be enforced by process for contempt from that in all other cases—in the latter the short form order practice becoming necessary to avoid the inconvenience and expense of reciting the whole decree in the writ of execution, not being within the provisions of the orders before mentioned—a writ of attachment in this case would clearly not be "process of contempt for nonpayment of any sum of money"; but the case would be one for obtaining and serving a short form order under the practice before the writ of execution was abolished.

It is true that it may be, or become, necessary to expend money in causing the mortgage to be discharged; more or less an expenditure of money is necessary in the doing, or causing to be done, of most things; so that in few cases indeed, if any, could the benefit of the Consolidated Rules 878 and 880 be had if the application—necessary now, under Consolidated Rule 879, in all cases—for leave to issue the writ, could be defeated by merely shewing that it would cost something, in money, to comply with the judgment.

If the substance of the thing were really a judgment for a debt, enforceable, as such, by the ordinary process of the Court, though put in another form, it might well be contended that the writ, in such a case, would be within the mischief intended to be prevented by those enactments, and the case a proper one for refusing leave to issue it.

Here the judgment is a consent one ; it is in the form Judgment. and in the words agreed upon by counsel for all parties : if MEREDITH, J. it were meant to be in substance a judgment for the payment of money it would doubtless in form have been so put. Being a consent judgment it cannot be materially changed without a like consent. And it has been put in such form and words that it cannot be enforced as a judgment or order for the payment of money. How then can any of the parties against the will of the other be heard to say : " It is an order for the payment of money and therefore you cannot enforce it against me by way of attachment," whilst, if sought to be enforced as a judgment or order for the payment of money : " You cannot have any process against my lands or goods in the ordinary way, because it is not a judgment or order so enforceable ? "

When the defendants consented to the judgment, they knew, or should have known, whether they could cause the mortgage to be discharged with or without the expenditure of money ; and it is to be observed that there is nothing in any of the material before the Court, on this application, directly shewing how much, if any, money must be paid before the judgment can be complied with. Indeed, the defendants, the Donovans, offered no excuse whatever, on oath, for noncompliance with it, or for the apparently contemptuous conduct, of the two male defendants, in giving another mortgage upon the land in question, instead of causing that in question to be discharged.

The case so far seems to me a clear one for granting leave to issue a writ, under Consolidated Rule 878, against the last mentioned two defendants : the other defendant is a married woman.

That being so, can they now escape on any technical ground—by reason of any want of formality in the proceedings ?

The whole case seems to me to be covered by, and provided for in, the Consolidated Rules.

Under Rule 878, " A writ of attachment against the person shall be issued under the same circumstances and

Judgment. shall have the same effect as according to the practice of
MEREDITH, J. the Court of Chancery, prior to the Ontario Judicature Act, 1881," but these broad words are much restricted by the next following Rule, which works a complete change in the practice of that Court prior to the Judicature Act, for then, under the Consolidated General Order 288, "If a party who is ordered, otherwise than by an order of course, to do any act, other than to pay money, in a limited time, refuses or neglects to obey the order according to the exigency thereof, the party prosecuting the order shall, at the expiration of the time limited, upon filing with the Registrar an affidavit of the service of the order, and of the nonperformance thereof, be entitled, upon *præcipe*, to a writ or writs of attachment against the disobedient party," and now the Rule (879), provides that "No such writ of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the person against whom the attachment is to be issued." And the other Rule, bearing directly upon the matter in question (880), is in these words: "If a person who is ordered, otherwise than by an order of course, to do any act other than to pay money, in a limited time, refuses or neglects to obey the judgment or order, according to the exigency thereof, the party prosecuting the same shall be entitled to a writ or writs of attachment against the disobedient party."

Now the one remaining question is, whether the fact that a copy of the judgment was not served upon the defendants within the three months mentioned in it, prevents the giving of leave for the issue of the writ.

We are in no way bound by the old common law cases, in which form and technicality seem to have played so important a part in applications of this character, and to have bound the Courts so effectually notwithstanding inclinations and regrets of many able Judges who even in those days groaned somewhat under the chain they felt powerless to break: see *Brandon v. Brandon*, 1 B. & P. 394, and *Dodington v. Hudson*, 1 Bing. 410.

In the common law Courts attachment was an extraor-

dinary remedy, considered to be of a criminal nature, re- Judgment.
sorted to only in cases of wilful disobedience, and obtained MEREDITH, J.
on rule to shew cause only.

In the Court of Chancery, on the contrary, the writ of attachment was an ordinary process for enforcing its decrees in all cases, until, in this Province, the legislation aimed at the abolition of imprisonment for debt began, and, since then until the passing of the Judicature Act, such ordinary process, obtained *ex parte*, in cases of orders other than to pay money.

And by "The Ontario Judicature Act, 1881," Order XL. Rule 1, and afterwards by the Consolidated Rules, which have now the force of legislative enactment—50 Vic. ch. 8, sec. 2 (O.)—the practice of the latter Court is to prevail, but subject to the radical change requiring an application on notice, and the leave of the Court or a Judge, before the writ can be issued.

It is quite clear that before the change in the practice, in the common law Courts as well as in Chancery, it was generally necessary that a copy of the decree or order should be served, and it was, moreover, required in the Chancery practice that such copy be endorsed with a notice that, in case of neglect to obey the order, the party would be liable to be arrested by the sheriff, and to have his estate sequestrated, for the purpose of compelling him to obey the order, without further notice; and limiting a time within which he might apply to the Court to add to, vary, or set aside the order, or suspend its operation.

The origin of and reason for the practice, in Chancery, requiring service of the order, is said to be "that under the original practice of the Court of Chancery no compulsory process issued against any party until he had been served with a mandate, under the Great Seal, commanding him to do what the Court required of him, for the offence committed was the not paying obedience to the Great Seal": and that "the writ which was served as a foundation for process of contempt was termed a writ of execution, and, after reciting the order or decree of the Court, required obedience to so much of the ordering part as

Judgment. ment or order endorsed as before mentioned, was expressly
MEREDITH, J. re-introduced in the English practice—see Order xli., Rule 5—as also was another—Order xlii., Rule 1—providing that in cases of judgments or orders for payment of money or for the delivery up or transfer of property a demand should not be necessary, but that the judgment or order should be obeyed upon due service of the same without demand: see *Hampden v. Wallis*, 26 Ch. D. 746: and see also *Selous v. Croydon Rural Sanitary Authority*, 53 L. T. N. S. 209.

Surely something was meant by the omission of these provisions from our Rules, which were framed, after much consideration, several years later: see *In re Evans, Evans v. Noton*, [1893] 1 Ch. 252: and *Petty v. Daniel*, 34 Ch. D. 172, at p. 181.

Consolidated Rule 524 may be thought to inferentially militate against this view; to indicate that personal service of an order is, generally, yet necessary before a writ of attachment can issue. But in such cases service of the order is of course necessary, not as a foundation for attachment proceedings, but to give any force or effect to the order: most interlocutory orders are not intended to have, and have not, any effect till served. With a final judgment it is entirely different: it does not require service to give it effect.

But even in respect of orders which needed service, and before the new Rules, there were exceptions to the rule requiring personal service of the order endorsed as the general order provided.

The case of the *United Telephone Co. v. Dale*, 25 Ch. D. 778, affords a good illustration of this, as well as of the more enlightened practice in cases where technical objection merely is relied upon.

For these reasons I am of opinion that the order for the writ ought to have been made against the male defendants, and therefore, would allow this appeal to that extent.

Appeal dismissed without costs,
MEREDITH, J., dissenting.

FLEMING ET AL. V. RYAN & Co.

Bills of Sale and Chattel Mortgages—Renewal—Assignment for the Benefit of Creditors—R. S. O. ch. 124, sec. 12—R. S. O. ch. 125, secs. 11, 15.

An assignee for the benefit of creditors under a general assignment made and registered pursuant to the Assignments and Preferences Act, R. S. O. ch. 124, may renew a chattel mortgage made in favour of his assignor, without the execution and registration of a specific assignment of that mortgage. A renewal statement, in itself in proper form, alleging title through the assignment for the benefit of creditors, is sufficient. Judgment of the County Court of Simcoe affirmed.

THIS was an appeal by the defendants from the judgment Statement. of the County Court of Simcoe.

The appellants were execution creditors of one Varty, and under an execution issued by them the sheriff of the county of Simcoe seized certain chattels, which were claimed by Henry Barber, assignee for the benefit of creditors of Robert Fleming, chattel mortgagee of the chattels in question. The sheriff interpleaded and an issue was tried before His Honour Judge Boys at Barrie in June, 1893. The chattel mortgage in question was made on the 7th of June, 1892, and the assignment, under the Assignments and Preferences Act, R. S. O. ch. 124, was made on the 9th of May, 1893. This assignment was filed in due time in the office of the clerk of the County Court of York. On the 7th of June, 1893, a renewal statement of the chattel mortgage in proper form was sworn to by Barber, the assignee, and was filed in the county of Simcoe. It set out that Barber was the assignee of the mortgage by virtue of an assignment for the benefit of creditors from Robert Fleming and Andrew Fleming to him, dated the 9th of May, 1893. No specific assignment of the chattel mortgage had been made by Fleming to Barber, and the execution creditors contended that the renewal was, therefore, void, but the learned County Court Judge held that the general assignment was sufficient.

The execution creditors appealed, and the appeal was argued before HAGARTY, C. J. O., and OSLER, and MACLENNAN, J.J.A., on the 16th of November, 1893.

Argument.

T. Hislop, for the appellants. Sections 11 and 15 of the Chattel Mortgage Act, R. S. O. ch. 125, expressly require the making and filing of an assignment of a chattel mortgage before such mortgage can be validly renewed by the assignee. These provisions have not been complied with, and therefore the renewal is void. The provisions of the Assignments and Preferences Act, R. S. O. ch. 124, as to filing an assignment deal merely with the time within which, and the place where, the assignment, as an assignment for creditors, is to be registered, and do not affect the express direction of the Chattel Mortgage Act as to registration of an assignment of mortgage, nor does the provision that the Chattel Mortgage Act is not to apply to assignments get over the difficulty. It was passed to do away with the doubt raised by *Hovey v. Whiting*, 14 S. C. R. 515, and to avoid the necessity of strict compliance with the provisions of the Chattel Mortgage Act, as far as assignments are concerned, but the decision now in appeal goes very much further than that, and takes the assigned chattel mortgage itself out of the operation of the Chattel Mortgage Act.

J. R. Roaf, for the respondents. Section 4 of the Assignments and Preferences Act vests all assets in the assignee so that the chattel mortgage in question clearly passed to him without any specific assignment. Then section 12 says that the Chattel Mortgage Act is not to apply, and this can only mean that an assignment for the benefit of creditors, while by virtue of section 4 it passes to the assignee all chattel mortgages held by the assignor, need not be registered under the Chattel Mortgage Act. Moreover, express directions are given as to the time and place of filing assignments for the benefit of creditors, and these directions must be regarded as exhaustive. Admittedly they have been complied with in the present instance, and having been complied with the assignee's title is good. Section 15 of the Chattel Mortgage Act does not require a registered assignment in all cases; for instance in the case of a renewal by one of the next of kin of the mort-

gagee. If then an exception is permissible in a case like that, much more should it be permitted in a case like the present where the nature of the title is stated on the face of the renewal statement, and can readily be investigated. Argument.

T. Hislop, in reply.

December 22nd, 1893. The Judgment of the Court was delivered by

HAGARTY, C.J.O.:—

Apart from the main point as to not filing the assignment itself, I can see no objection to the assignee's renewal.

He refers to the original mortgage, and states that he is the assignee thereof by virtue of an assignment for the benefit of creditors, made by the Flemings, giving its date.

Section 12 of R. S. O. ch. 124 declares that no assignment for the general benefit of creditors shall be within the operation of the Chattel Mortgage Act, but notice shall be given in the *Ontario Gazette* and another paper. Subsection 2 directs that a counterpart or copy shall be registered within five days in the county clerk's office of the county where the assignor resides, or if not a resident of Ontario, in the office of the county where the principal part of the property may be.

These sections seem to cover all questions as to registration or filing of the general assignment.

Section 11 of the Chattel Mortgage Act, R. S. O. ch. 125, provides for the renewal of any mortgage extending over a year, and avoids the same if not renewed as directed. This section has been, we think, properly observed by the assignee Barber.

Then the appellant relies on section 15, which requires the assignee of a mortgage to file the assignment to him at the time of such refiling.

This section does not declare that the omission of the provision shall invalidate the security.

Judgment.

HAGARTY,
C.J.O.

I think section 12 of ch. 124 takes the assignment for creditors out of the operation of the Chattel Mortgage Act, and makes special provisions for the public notice and registration of such a general assignment.

Here the original chattel mortgage was duly filed under the statute. It never was expressly assigned to Barber, but passed to him under the general conveyance of all the insolvent's estate.

I think that he sufficiently complied with the renewal requirements when he stated his title to the mortgage to be that of an assignee under a general assignment of the insolvent estate made by the Flemings, giving its date.

I think that the appeal should be dismissed.

Appeal dismissed with costs.

REGINA V. HALLIDAY.

Constitutional Law—Liquor License Act—R. S. O. ch. 194, secs. 51 (2), and 61—Warehouse.

Section 51 (2) of the Liquor License Act, R. S. O. ch. 194, which requires brewers licensed by the Government of Canada to take out licenses under that Act is *intra vires* provincial legislation.

Severn v. The Queen, 2 S. C. R. 70, has been in effect overruled by more recent decisions of the Judicial Committee.

A cellar in a brewery where beer is stored is a "warehouse" within the meaning of section 61 of the Act.

Judgment of the County Judge of Wellington reversed.

Statement.

THIS was an appeal by the Attorney-General for Ontario from the judgment of the Judge of the County Court of Wellington in General Sessions.

The defendant was a brewer carrying on business in the city of Guelph, and was, on the 15th of December, 1892, convicted by the Police Magistrate of that city, for that he "within the space of thirty days last past, at the city of Guelph, then being a brewer and having a

license to sell by wholesale, did then and there unlawfully allow liquor in his possession for sale and for the sale of which such license is required, to be consumed within his warehouse, to wit, within his brewery in the said city of Guelph." It was proved at the trial that the defendant had a Dominion license to manufacture as a brewer, and also that he had a wholesale license from the Ontario government authorizing him to sell liquor manufactured by him, this license providing that the licensee should not allow liquors to be consumed within the brewery of the licensee, or within any building which formed part of, or was appurtenant to, or which communicated by any entrance with, the brewery. It was proved that several men were given beer in the cellar of the brewery and drank it there, and that a large quantity of beer was stored in this cellar.

Statement..

On appeal to the Sessions the conviction was quashed, the Judge holding that the cellar was not a warehouse within the meaning of section 61 of the Liquor License Act, R. S. O. ch. 194.

This appeal was thereupon brought and was argued before HAGARTY, C.J.O., BOYD, C., and OSLER, and MACLENNAN, J.J.A., on the 20th of November, 1893.

J. R. Cartwright, Q.C., for the appellant. Clearly this cellar was a warehouse within the meaning of the section, that is, a place where beer was stored: *Regina v. Hill*, 2 Moo. & Rob. 458.

E. F. B. Johnston, Q. C., for the respondent. A cellar in a brewery is not a warehouse. The word evidently refers to a building not part of or connected with the brewery itself. But, apart from this, the section under which this conviction is sought to be supported is *ultra vires*. The province of Ontario has no right to require a license from brewers who are licensed by the Dominion Government: *Severn v. The Queen*, 2 S. C. R. 70.

J. R. Cartwright, Q.C., in reply. The defendant cannot

Argument. now raise this constitutional point, for he has accepted the license from the Ontario Government, and must obey its terms. Moreover, *Severn v. The Queen*, 2 S. C. R. 70, has been in effect overruled by later decisions of the Judicial Committee of the Privy Council. See particularly, *Bank of Toronto v. Lambe*, 12 App. Cas. 575, and the argument and report on the case stated as to the validity of the Dominion License Act of 1883. See also, *Regina v. McDougall*, 22 N. S. 462; *Pigeon v. Recorder's Court*, 17 S. C. R. 495; and *Molson v. Lambe*, 15 S. C. R. 253.

December 22nd, 1893. BOYD, C.:—

Section 61 of the Ontario License Act, R. S. O. ch. 194, is identical with section 76 of the Liquor License Act of Canada, 1883 (46 Vic. ch. 30). That whole Act of the Dominion, assuming to regulate the liquor traffic, was declared *ultra vires* by the Privy Council, upon a statutory case submitted. See note, 4 Cartwright, p. 342. It follows that the regulation of the liquor traffic is a matter of provincial competence. To this effect both Ritchie, C.J., and Fournier, J., express themselves, that since *Severn v. The Queen*, 2 S. C. R. 70, the course of decision in the Privy Council has removed any doubt as to the power of provincial legislatures to pass laws regulating the sale of liquors (whether wholesale or retail), in *Molson v. Lambe*, 15 S. C. R. 253. This was a brewer's case, the question being as to the capacity of the Quebec Legislature to require a license to be taken out by brewers duly licensed to manufacture by the Dominion. The Act in question declared that whoever sold intoxicating liquors in any quantity must have a provincial license.

Ramsay, J., in the Court below, said this was to be defended under the B. N. A. Act, sec. 92, sub-sec. 9, and amounted to an impost by way of license for the purpose of raising revenue on the ordinary trade of a brewer. He referred to *Severn v. The Queen*, as an isolated and com-

promised judgment of a divided court, and the majority of the Court held, as did the Supreme Court, that the Act was constitutional.

Judgment.

Boyd, C.

Mr. Justice Strong (now the Chief Justice of the Supreme Court) took substantially the same view in *Severn v. The Queen*, and I think the course of decision has been to displace the authority of that case, and to authenticate the opinions of Ritchie and Strong, JJ., the dissentient justices.

In 1889 the same question as to the effect of *Severn v. The Queen*, came before the full Court of Nova Scotia, and the majority of the Court held that the *Severn* case was practically overruled. No mention is made by the Maritime Judges of the prior case of *Molson v. Lambe*, 15 S. C. R. 253, which was, I suppose, not then published: *Regina v. McDougall*, 22 N. S. 462.

So the Court of Queen's Bench in Quebec, in appeal, held, in 1890, that the local legislature might authorize municipalities to levy a tax for local purposes on wholesale liquor dealers: *McManamy v. Sherbrooke*, M. L. R. 6 Q. B. 409.

R. S. O. ch. 194, sec. 51, requires brewers, distillers, etc., to obtain a license to sell by wholesale, treating them, though manufacturers, as also wholesale dealers. To this no valid objection can now be raised, it appears to me, because of it being an interference with trade. In one aspect it may be so, but in another aspect it is a means of raising revenue for local and provincial purposes, and of police regulation for the preservation of order. The legislation is justified, under the B. N. A. Act, sec. 92, sub-secs. 8 and 9. The Liquor License Act is properly classified in the statutes under the head of municipal matters, and the whole object of the enactments in question is to exercise supervision over the sale and consumption of spirituous and fermented liquors, imposing license fees for the purpose of defraying the expenses of such local government, with a surplus for other municipal and provincial purposes (sec. 45). Besides, the defendant has taken

Judgment. the provincial license, has submitted to its terms, and cannot complain if it is enforced. This was the important question argued.
BORN, C.

As to the conviction in appeal: I think the police magistrate was clearly right in holding that the stock-cellar was a "warehouse" within the meaning of section 61. The case of *Regina v. Hill*, 2 Moo. & Rob. 458, may be used, if needed, to affirm this view.

As to the facts: it was found by the magistrate that the offence had been committed of allowing beer to be consumed by drinking in the cellar of the defendant's brewery, and the only point relied on before the local Judge in appeal was, that there was no "warehouse" connected with the brewery; but, in my view, the conclusion of the magistrate should be affirmed.

OSLER, J.A. :—

This is an appeal by the Attorney-General from the judgment of the County Judge of Wellington, quashing a conviction of the defendant made by the police magistrate of the town of Guelph. The appeal derives any importance solely from the objection, first raised by the respondent in this Court, that sections 51 (2) and 61 of the Liquor License Act are *ultra vires* the Provincial Legislature, the defendant being a brewer and the holder of a license to manufacture beer, etc., from the Dominion Government.

He relies upon *Severn v. The Queen*, 2 S. C. R. 70, and certainly if we could now act upon that case without regard to more recent decisions, we should have no difficulty in upholding the judgment by which the conviction has been quashed. It has not been, in terms, overruled by the Judicial Committee of the Privy Council, and it may be said that, although it could be explained or distinguished, it could not be overruled by the Court which decided it. Nevertheless, the grounds on which it rested appear to have been considerably weakened, if not entirely demol-

ished, as the Federal Act has become more extensively discussed and perhaps better understood. These grounds were: (1) That the imposition of a license by the local government upon a person carrying on the trade of a brewer and the manufacture of beer, and who already held an excise license from the Dominion Government, was an interference with the exclusive powers of Parliament as to the regulation of trade and commerce, under section 91, clause 2, of the B. N. A. Act, and could not be regarded merely as the exercise of a police power; (2) that the right conferred upon the local legislatures by section 92, clause 9, to deal exclusively with shop, tavern, auctioneer, and other licenses, did not extend to licenses to brewers, or other licenses which were not of a local or municipal character; and (3)—which is perhaps included in, or covered by, the last ground—that such licenses were not authorized by section 92, clause 2, as an exercise of a power of direct taxation within the province in order to the raising of a revenue for provincial purposes—in short, that they were indirect taxation.

The first ground seems no longer sustainable in the face of *Hodge v. The Queen*, 9 App. Cas. 117, which affirms the power of the local legislatures to regulate the sale and disposal of intoxicating liquors, and the later case of *Bank of Toronto v. Lambe*, 12 App. Cas. 575, which is also directly opposed to the view that a local license fee, whether upon brewers or upon bankers, would be an interference with trade and commerce. As to the other grounds, the last mentioned case affirms the power of the legislature to impose a direct tax upon a bank, or other commercial corporation, carrying on business within the Province, and inferentially, therefore, that a license fee imposed upon a person carrying on the trade of a brewer and wholesale vendor of ale is not indirect taxation, but comes within the 2nd clause of the 92nd section of the Act, and is *intra vires* provincial legislation.

Further, this view of the effect of these decisions is taken by the Supreme Court itself in *Molson v. Lambe*, 15 S. C. R.

Judgment.

OSLER,
J. A.

Judgment.

OSLER,
J.A.

253; and no one can read the report of the argument and discussion before the Judicial Committee upon the question of the validity of the Dominion Licensing Acts of 1883 and 1884, which were ultimately declared by that body to be *ultra vires* the Dominion Parliament, without seeing that the legitimate consequence of their decision is to affirm the power of the provincial authority to impose a license or tax upon a brewer or manufacturer of beer, and to regulate the mode of carrying on the business or trade. I think, therefore, that the sections in question are *intra vires*.

And I am also of opinion that the place in which the liquor was given away and consumed was a warehouse within the meaning of section 61 of the Liquor License Act. It was a place where the liquor kept for sale was stored, and that seems enough to constitute it a warehouse, though it might also properly enough have been designated a cellar. I see no reason to hold that the warehouse mentioned in that Act must necessarily be some place away from or not under the same roof as the manufactory or brewery.

The judgment of the police magistrate, which, besides being right in law, exhibits—what one is sorry to observe too often wanting in these liquor prosecutions—some plain common sense, must, therefore, be restored, and the conviction affirmed. But as the defendant has once been acquitted of the offence by a competent Court, I think that, as the Crown has thought it worth while to pursue him further, he ought not to be visited with the costs of the appeal.

HAGARTY, C.J.O., and MACLENNAN, J.A., concurred.

Appeal allowed without costs.

**GUINANE V. SUNNYSIDE BOATING COMPANY OF TORONTO,
ET AL.**

Company—Club—Expulsion of Member—Evidence—Notice.

The directors of a club in exercising disciplinary jurisdiction under a by-law providing that "any member guilty of conduct which in the opinion of the board merits such a course may be expelled," are not bound by legal rules of evidence, and their decision, arrived at after a fair investigation of the facts, will not be interfered with because they have admitted as part of the evidence in proof of the charge the informally sworn statement of one of the persons concerned in the transaction.

Where the charge has been made, discussed, and replied to, in the public prints, it is not necessary to give to the accused person who has taken part in such discussion, when calling upon him to shew cause against his proposed expulsion, specific particulars of the accusation; a general statement is sufficient.

Judgment of ARMOUR, C.J., affirmed.

THIS was an appeal by the plaintiff from the judgment Statement.
of ARMOUR, C. J.

The defendant company had established a club known as the Sunnyside Boating Club, for the purpose of engaging in and encouraging rowing and other aquatic sports. Members of the club were entitled to use the rooms and boat-racks of the club, and also had certain privileges in regard to races held under the management of the Canadian Association of Amateur Oarsmen, by the constitution of which any member expelled from any club belonging to the association forfeited these privileges. In the year 1890, the plaintiff was duly elected a member of the club, paid his fees from time to time and rented and used several boat-racks. Under the management of the association a regatta was held at Toronto in the month of July, 1892, and in one of the races, known as the senior single scull race, a youth named Edward Durnan, who was a member of the club, and others, competed. Durnan was defeated, and it was alleged that he had been induced by the plaintiff, who was captain of the club, to lose the race in order that the plaintiff might win bets made by him. The matter was freely discussed in the newspapers at the time, and Durnan, at the instance of his uncle, Edward Hanlan, signed

Statement. the following statement, purporting to take an oath that it was true: "I hereby declare that John Guinane approached me on the morning of the 22nd of July, and induced me to sell the final heat of C. A. A. O. on July 22nd, and promised me half of the winnings of his bets, and fixed up a job, and also arranged for the N. A. A. O. at Saratoga. I swear that this is the truth."

This statement was published in the newspapers and was denied by the plaintiff. The sixth rule of the constitution of the company provided that "any member wilfully infringing any of the rules or regulations of this company, or being guilty of ungentlemanly or other conduct, which, in the opinion of the board, would merit such a course, may be expelled by them from membership." On the 25th of July, 1892, the directors of the defendant company passed a resolution suspending the plaintiff from membership; and on the 31st of August, 1892, a resolution was passed expelling the plaintiff and Durnan from membership, "unless satisfactory explanations be personally made by them to the company's board of directors, in reference to the single scull race on the 21st and 22nd of July last, in which Durnan participated, on or before the next meeting of directors to be held on the 7th of September next." A copy of this resolution was sent to the plaintiff on the 1st of September, 1892, by the secretary of the club, and in reply the plaintiff wrote to the secretary on the 3rd of September, 1892, acknowledging the receipt of the letter and stating that "If you will furnish me with particulars of what I am charged with in connection with the matter, I shall at once answer them fully; meantime I can do nothing more than say that I have done nothing wrong and have been guilty of no misconduct in reference to the races." No further particulars were sent to the plaintiff; and on the 7th of September, the directors, as he did not appear and made no explanation, expelled the plaintiff from membership. At this meeting Durnan appeared and repudiated his previous confession, but other statements of facts were made at that time to the board.

The plaintiff brought this action claiming a declaration Statement. that the suspension and expulsion were illegal and void, and asking for an injunction and damages.

The action was tried at Toronto, on the 7th of March, 1893, before ARMOUR, C. J., who gave judgment in favour of the defendants with costs, coming to the conclusion on the evidence that the race was a fraudulent one.

It was shewn that several of the directors had backed Durnan.

The plaintiff appealed and the appeal was argued before HAGARTY, C. J. O.; BOYD, C., and OSLER, and MACLENNAN, JJ. A., on the 20th of November, 1893.

W. Cassels, Q. C., for the appellant. The defendants proceeded altogether irregularly in the course they took, and had no evidence whatever before them to justify the expulsion of the plaintiff. They gave him no notice of the charge made against him, and they received and acted upon a so called confession of Durnan, which was made in the absence of the plaintiff, and to which he had no opportunity of replying. It would be contrary to justice to allow the plaintiff to be publicly disgraced without a trial, without evidence, upon mere newspaper rumours, and to be tried by men whose interest it was to convict in order to escape payment of their bets.

John McGregor, and *H. M. East*, for the respondents. The charges affecting the plaintiff were matters of public interest, and had been fully debated in the newspapers before the defendants took any action in regard thereto. The plaintiff knew perfectly well what the charges against him were, and could readily have met the directors at the time fixed, and have disproved the charges if untrue. The defendants were entitled to act on all information that they were able to obtain, and also to draw their own inference from what they themselves had seen of the races in question. They acted in good faith and for the benefit of the company, and cannot now be held to account merely

Argument. because they have not proceeded in strict accordance with the legal rules governing the reception of evidence.

W. Cassels, Q. C., in reply.

December 22nd, 1893. The judgment of the Court was delivered by

BOYD, C.:—

On the 25th July, 1892, the directors resolved to suspend the plaintiff from membership in the club pending investigation as to the truth of the reports in reference to his misconduct in the Durnan race. Of this the plaintiff had notice.

On the 31st August, 1892, the directors resolved that the plaintiff be expelled from membership in the club unless satisfactory explanations be personally made to the board in reference to the single scull race on 21st and 22nd July last, in which Durnan participated—on or before the next meeting of directors, to be held on 7th September next.

The plaintiff was notified of this action of the board—did not attend in person to make explanations, but contented himself with writing a letter to the board on the 3rd September, in which he asked for particulars of what he was charged with that he might answer them fully, and denied generally any wrong-doing or misconduct in reference to the races.

The board having before them the statement (informally under oath) of Durnan, dated 5th August, that the plaintiff had induced him to sell the final heat on 22nd July, with a promise of half the winnings—proceeded at the meeting of the 7th September to expel the plaintiff.

The secretary-treasurer of the club said in evidence, “the strongest fact was, that the board could not get over the statement signed by Durnan.”

“We took into consideration also the fact that the plaintiff did not think it of sufficient importance to appear personally—and he knew all the particulars.”

According to this view the letter was regarded as a subterfuge, and the neglect of the plaintiff to personally appear, gave effect to the written statement of Durnan, against Durnan's denial of anything being wrong, at the same meeting, and his explanation how he came to sign the paper.

Judgment.

Boyd, C.

The matter of complaint appears to have been of public notoriety. The details of the race and the manner of his losing, were communicated by Durnan to the newspapers on 30th July. On the 5th August, he made the statement under oath in contradiction of this letter and implicating the plaintiff.

This statement was also published, and that its contents were fully known to the plaintiff, appears from his letter to the papers dated 6th August, 1892. Durnan again wrote to the newspapers on the 16th August, retracting his statement under oath of the 5th August, which was followed by a letter from Edward Hanlan affirming the authenticity of Durnan's confession, published on the 18th August. I think that no doubt can exist as to the correctness of what was said by the secretary-treasurer of the club, that all the particulars were known to the plaintiff, and that he did not need to ask for them in order to be able to meet them. See *Richardson-Gardner v. Fremantle*, 24 L. T. N. S. 81. Then knowing the charge against him, he had an ample opportunity of meeting it in person before the board. This was the express direction of the board, and therein he made default, and so judgment passed against him, and that not without reasonable evidence.

By the rules and regulations of the club, these matters of discipline are under the control of the directors as a board. Rule 6 covers this case: "Any member * * being guilty of * * conduct, which, in the opinion of the board, would merit such a course, may be expelled by them from membership."

No question, if the plaintiff was guilty of the conduct mentioned in the statement of Durnan, he was properly expelled. No doubt, he knew the nature of the charge

Judgment. against him, and did not appear to explain in person. No
BOYD, C. doubt, it was competent for the board to act upon the
written confession as against the withdrawal of it, and as
against the general written denial of the plaintiff contained
in his letter. The Chief Justice, who saw the witnesses,
gave credit to the evidence of Hanlan, the uncle of Durnan,
and it does seem incredible that Hanlan should have pro-
cured his nephew to write down his own condemnation
and swear to it—if there was, in fact, no misconduct in-
volved. There is, therefore, no such violence in the
deduction made by the board from the materials before
them as would induce the suspicion of malice or *mala*
fides.

The objection was made that this confession of Durnan
was not legal evidence against the plaintiff. But the
observation has been made more than once that these vol-
untary associations are not restricted in their actions by the
limitations of legal evidence as held in the Courts. Even
in Courts the rules of evidence have grown up as the result
of practice, not by the law of the land: *Duke of Beaufort v.*
Crawshay, Har. & Ruth. at p. 646. And by parity of reason,
such lines of evidence must be used by private clubs and
corporations as are within their competence to procure. I
may be permitted to repeat what was said in *Hands v.*
Law Society of Upper Canada, 16 O. R. at p. 632: "These
bodies may be well content to proceed upon what has been
happily called 'human evidence,' i. e., the evidence on which
men transact the ordinary business of life." And in a case
decided a month later, North, J., alludes to the same matter
thus: "This is a case in which the council cannot possibly
decide on legal evidence. They cannot get legal evidence.
And unless they introduced and gave weight to matters the
admission of which was manifestly contrary to natural
justice, it is not a case in which I should feel I could inter-
fere at all:" *Leeson v. General Council of Medical Educa-*
tion, 43 Ch. D. at p. 372.

The question again is, not what a court of justice would
have done in the circumstances, but whether, sufficient

notice of the charge and place of investigation being given, the board acted *bond fide* in doing what they believed to be for the best interests of the club: *Inderwick v. Snell*, 2 Mac. & G. 216. See judgment of Brett, L. J., in *Dawkins v. Antrobus*, 17 Ch. D. at p. 629.

Judgment.

Boyd, C.

It is enough to say that the findings of fact of the trial Judge, shew that the decision of the board was not so manifestly absurd and so manifestly idle, that it could only have been a false pretence to cover something else. (*Per Kay, J.*, in *Lambert v. Addison*, 46 L. T. N. S. 20, 25; *Seaton v. Gould*, 5 Times L. R. 309.)

The result is that the judgment in appeal should be affirmed.

Appeal dismissed with costs.

TREBILCOCK V. WALSH.

Gaming—Wager—Illegality—Stakeholder—R. S. C. ch. 159, sec. 9.

R. S. C. ch. 159, sec. 9, is aimed at the suppression of the *business* of betting and pool selling, and does not apply to bets between individuals, whether stakes are or are not deposited in the hands of a third person. And while a bet between individuals as to the result of a parliamentary election is illegal, it is not a misdemeanour to make such a bet, and either party may, before the money has been paid over by the stakeholder, recover back from him the amount deposited by that party.

Regina v. Dillon, 10 P. R. 352, approved.

Judgment of the Common Pleas Division affirmed, Boyd, C., dissenting.

THIS was an appeal by the defendant from the judgment of the Common Pleas Division. Statement

The plaintiff and one J. E. Richards resided in London and were voters qualified to vote at Dominion elections. On the 23rd of February, 1892, when an election of a member of the House of Commons for the electoral district of the city of London was about to be held, the plaintiff and Richards made a bet of which the terms were as follows :—

Statement.

“ Mr. F. T. Trebilcock bets Mr. J. E. Richards \$500 that C. S. Hyman is the gazetted member of Parliament for the city of London at the coming election of the Dominion House to take place on Friday the 26th day of February, 1892. ” The defendant was agreed upon as stake-holder and each party deposited with him the sum of \$500. The election was held on the 26th of February and the plaintiff and Richards voted thereat. On the evening of the polling day the plaintiff notified the defendant that he had withdrawn from the bet and demanded repayment of the \$500 deposited with him. At this time the whole amount was in the hands of the defendant, but subsequently, when Mr. Hyman's opponent had been gazetted as the member returned at the election, the defendant paid over the stakes to Richards, taking a bond of indemnity from him.

Thereupon this action was brought to recover the \$500, and was tried at the London Spring Assizes of 1892, before STREET, J., who on the 21st of May, 1892, gave judgment in favour of the plaintiff and this judgment was affirmed by the Divisional Court.

The defendant appealed and the appeal was argued before HAGARTY, C.J.O., BOYD, C., and OSLER, and MACLENNAN, J.J.A., on the 20th and 21st of November, 1893.

W. R. Meredith, Q.C., for the appellant. The wager in question being a wager upon the result of a political election the defendant was, under R. S. C. ch. 159, sec. 9, guilty of a misdemeanour in becoming the custodian of the stakes and the plaintiff being a party to that criminal act cannot recover back the amount deposited by him: *Johnson v. Martin*, 19 A. R. 592. The plaintiff could not make out his case without shewing that the money had been placed in the hands of the defendant in such manner as to contravene the provisions of that section: *Nicholson v. Gooch*, 5 E. & B. 999; *Herman v. Jeuchner*, 15 Q. B. D. 561. It has been decided in *Regina v. Dillon*, 10 P. R. 352, that the section in question does not apply to wagers be-

tween individuals but it is submitted that that case is wrongly decided and that altogether too limited a construction has been there adopted. The true construction is, that the stake-holder is always liable to the penalty and the exception of "bets between individuals" was inserted in order to make it clear that it was not intended to make persons who simply bet between themselves subject to the penal consequences of the Act. If, however, the section does not apply the bet was not illegal at all as it was not a bet on the result of the election but merely as to the gazetting of the member so that the plaintiff cannot in either alternative recover back the money. Argument.

Aylesworth, Q.C., and *J. B. McKillop*, for the respondent. Clearly the bet related to the election and not to the mere gazetting of the member and it was one that is against public policy and illegal at common law: *Allen v. Hearn*, 1 T. R. 56. The bet being illegal and the plaintiff having demanded his money before it was paid over was entitled to recover: *Davis v. Hewitt*, 9 O. R. 435; *Diggle v. Higgs*, 2 Exch. D. 422; *Varney v. Hickman*, 5 C. B. 271; *Hastelow v. Jackson*, 8 B. & C. 221; *Trimble v. Hill*, 5 App. Cas. 342; *Hampden v. Walsh*, 1 Q. B. D. 189. The defendant was not guilty of a misdemeanour. Sub-section 2 of section 9 of R. S. C. ch. 159, is aimed at the repression of the business of professional stake-holder or professional pool-seller. It does not apply at all to a person who holds the stakes for a bet between two individuals. *Regina v. Dillon*, 10 P. R. 352, is an express authority to this effect and the reasoning of that case is conclusive.

W. R. Meredith, Q.C., in reply.

December 22nd, 1893. HAGARTY, C. J. O.:—

I see no reason for differing from the decision of my brother Osler, in *Regina v. Dillon*, 10 P. R. 352, and I adopt his reasoning as to the effect of section 9 of R. S. C. ch. 159.

If the Act applied to a case of this kind, it would be a

Judgment.
HAGARTY,
C.J.O.

singular piece of legislation, making the stake-holder liable to a fine of \$1,000 and a year's imprisonment, leaving the actors, the bet makers, unpunished.

As it is held not to affect bets between individuals, we have to dispose of the case on the general law.

Bets on the result of an election are void and cannot be enforced as being against public policy : *Allen v. Hearn*, 1 T. R. 56.

In the present case the plaintiff did an illegal and void act in making this bet or wager.

The Act does not aim at the suppression of wagering on lawful races, or against the custodian of money, etc., deposited on a lawful race in sport ; yet the mischief from gambling or betting may be equally great on the lawful as on the unlawful subject matter.

Besides the common law invalidating this bet, our Dominion Election Act, R. S. C. ch. 8, sec. 131, provides that every executory promise or contract or undertaking in any way referring to, arising out of or depending upon any election, etc., shall be void in law.

It being illegal either for the plaintiff to make the wager or for Richards to receive the money, I think the law allows the plaintiff, before the payment over, to repent of his illegal act, and to endeavour to recall the money designed for the unlawful purpose, before its application to such purpose.

The stake-holder holds the plaintiff's money without consideration.

Bayley, B., in delivering the judgment of the Court in *Hodson v. Terrill*, 1 C. & M. 797, says, at p. 804 : " Where a party has money put into his hands to pay to another, which it would be illegal in the other to receive, the person placing it there would have a right to stop it, and prevent the holder, by due notice, from paying it over to the other," and he refers to *Hastelow v. Jackson*, 8 B. & C. 221, to shew that though the wager was clearly illegal, yet the plaintiff was entitled to recover.

That case is a very full and clear view of the law ; so

long as the illegal contract is executory, the money deposited can be recovered back. If paid over before notice, the purpose is executed, and the *potior est conditio possidentis* doctrine applies.

Judgment.

HAGARTY,
C.J.O.

Vaughan, B., in the same case, cites the language of Holroyd, J., in *Robinson v. Mearns*, 6 D. & R. 26 : "The right of the party to recover back a deposit does not depend upon whether the wager be illegal and void, or whether it be won or lost ; but upon whether the stakeholder has received it on an illegal consideration, for if he has he is bound to refund it."

I am not prepared to hold that, even if Mr. Meredith be right in applying R. S. O. ch. 159 to this case, the plaintiff's right to recover back his money before payment over, is necessarily defeated.

The law has gone far in allowing a person who has illegally placed money in the hands of another to be applied to an illegal purpose, to interpose and require its repayment before such purpose is accomplished.

Heath, J., says in *Tappenden v. Randall*, 2 B. & P. 467 : "Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it ; as where one man has paid money by way of hire to another to murder a third person. But where nothing of that kind occurs I think there ought to be a *locus pœnitentiæ*, and that a party should not be compelled against his will to adhere to the contract."

We need not be astute to give the chance for further illegality by allowing the stakeholder to consummate the contemplated illegality by paying over the money, or by appropriating it to his own use.

OSLER, J. A. :—

The judgment should, in my opinion, be affirmed.

I have given to Mr. Meredith's forcible argument, and to the learned Chancellor's opinion, the attention they deserve,

Judgment.

MAOLENNAN,
J.A.

So far, I think it is clear that it is the business of doing these things which is being dealt with. Then comes subsection 3, which forbids the becoming custodian or depository of any money, etc., and to my mind the inference is very strong, that this also means where it is done as a matter of business; and that it is the professional stake-holder who is intended. I do not know exactly what pool selling is; I do not find it defined any where, but the first section of the Imperial Act, 16 & 17 Vic. ch. 119, describes pretty clearly the kind of business which was there sought to be suppressed, and further light is thrown upon it by Mr. Justice Hawkins, in *Regina v. Preedy*, 17 Cox C. C. 433. I understand, then that there are, or were, when this Act was passed, persons who kept houses or rooms for recording and registering bets and selling pools, and who kept and exhibited on their premises certain devices or apparatus for registering bets and selling pools; and as incidental to this recording and registering, and pool selling, were prepared to receive, and it was part of their business to receive, stakes from any person who resorted to their places of business, and wagered on the result of races and other things. In such cases the person depositing his stake was not betting with any other known individual; he was staking his money on a chance, whatever it might be. There was no stake deposited by any one else as against him. The only person he knew in the transaction was the professional stake-holder. Reading section 2 by itself, I should have thought that is the kind of deposit or stake, the receipt of which was intended to be made criminal. It is noticeable that such is clearly the effect of the corresponding section (4) of the Imperial Act. But when the exception contained in section 3 is considered, I think all doubt is removed. The Act is not to extend to "bets between individuals." It is not bets where there is no stake deposited, which it would be easy and obvious for the sake of clearness to say, if that was meant; but all bets between individuals. That is, whenever two individuals make a bet with each other, that

case is excepted. It is no less a bet between individuals, that they have deposited stakes with a third person, and I cannot see how we can confine the exception to bets where there is no stake-holder.

Judgment.

MACLENNAN,
J.A.

Then the statute being out of the way, the bet was merely illegal, being upon the result of an election of a member of the House of Commons. The plaintiff demanded the return of his stake before it was paid over, and the authorities are clear that having done so, he has a right to recover it back from the defendant.

The appeal must, therefore, be dismissed.

BOYD, C. :—

Internal evidence would seem to shew that the Canadian Act, 40 Vic. ch. 31, entitled "An Act for the repression of Betting and Pool Selling," was suggested by the somewhat analogous Imperial Statute 16 & 17 Vic. ch. 119. But the decisions on the earlier Act cannot guide us to the construction of the Dominion Statute, though they afford valuable light to assist in its elucidation. The scope of the two Acts is different: the British Act was intended to put down betting houses, and to suppress the operations of the persons who keep what may be described as banks for the purpose of inducing other persons to come and bet with them (per A. L. Smith, J., in *Hornsby v. Raggett*, [1892] 1 Q. B. 24). See, also, *Regina v. Cook*, 13 Q. B. D. 377.

Again, commenting on the Act in *Regina v. Preedy*, 17 Cox C. C. 433, at p. 441, Hawkins, J., says: "It was certainly not the intention of the legislature to make all betting illegal, and it is just as lawful now as ever it was for persons to bet together casually at any place, and as often as, and to any extent, they please. The mischief that the Act was pointed at was, as expressed by Erle, C. J., in *Doggett v. Catterns*, 17 C. B. N. S. 669, the habit of using a particular place by persons skilled in gambling and betting for the purpose of luring the ignorant and im-

Judgment.

BOYD, C.

prudent to the ruinous courses to which the vice of gambling too frequently leads, and for the purpose of checking that habit it was forbidden to any person to use any place for the purpose of systematically carrying on a business of betting with, or receiving deposits in bets from, persons resorting thereto. * * It would seem from the preamble that the legislation was directed to that kind of gambling which for the sake of brevity I will call receiving money by way of deposit in bets." Now, the Canadian Statute, R. S. C. ch. 159, sec. 9, presents a remarkable variation in respect to the custodians of wagers—not restricting to any locality as in the English analogue, but a general provision that "Every one who * * becomes the custodian or depositary of any money, property, or valuable thing, staked, wagered, or pledged, * * upon the result of any political or municipal election, * * is guilty of a misdemeanour." To me that appears to be an explicit provision in prohibition of that particular form of gaming in which money is placed in the hands of a custodian (or stake-holder) to be paid over upon the result of a public election. That clear provision is not nullified by the excluding clause which follows that nothing in the section shall apply to the custodian of money to be paid to the winner of any lawful race, sport, game, etc., or "to bets between individuals." I read the last words as expressing what is said by Hawkins, J., that all betting between individuals is not prohibited; but where the bet is prosecuted by the deposit of stakes in the hands of a third person, then the Act is intended to repress that method of betting, because it says so.

The bet in this case was within the express language and mischief of the Act, and the plaintiff in his statement of claim sets forth the whole transaction so as to expose its illegality as a violation of the statute. The transaction is made a misdemeanour as to the recipient of the moneys deposited, and by R. S. C. ch. 145, sec 7, it is also a misdemeanour as to the person making such deposit. That being so these parties are either *in pari delicto* or

the plaintiff is *particeps criminis*, and in either view dis- Judgment.
entitled to sue for the money so deposited. The transac- Boyd, C.
tion is taken out of the region of mere illegality and is
made one of positive prohibition as a criminal thing. The
cases, therefore, of illegal wagers are not pertinent wherein
the *locus poenitentiae* is permitted while yet the money is
in the hands of the stake-holder. Another class of autho-
rities prevails, such as those referred to in *Tappenden v.*
Randall, 2 B. & P. 467, the principle of which is thus
given by Lord Mansfield: "If the act is itself criminal or
a violation of the general laws of public policy, then the
party paying shall not have his action, for when both
parties are equally criminal against such general laws the
rule is *potior est conditio defendentis*" : *Smith v. Bromley*,
Doug. 697 (n.). See also *McKinnell v. Robinson*, 3 M.
& W. 434.

For these reasons, shortly expressed, I would reverse the
judgment and dismiss the action of the plaintiff with such
costs as would be taxable as upon a demurrer.

Appeal dismissed with costs,
Boyd, C., *dissenting.*

IN RE THE HESS MANUFACTURING COMPANY.

SLOAN'S CASE.

*Company—Promoter—Trust—Sale of Land—Stock—Contributory—
Winding Up.*

To make an alleged promoter of a company liable for the amount of paid up shares allotted to him in consideration of the transfer by him to the company of property standing in his name, it must be shewn that at the time of its acquisition by him he stood in such a relation to the intended company that he could not claim to have bought the property for himself, and, therefore, that there was no consideration for the allotment; and the Court [HAGARTY, C.J. O., dissenting], having on the evidence come to the conclusion that this was not shewn, reversed the judgment of MEREDITH, J., 23 O. R. 182.

Statement.

THIS was an appeal by Dr. Sloan from the judgment of MEREDITH, J., reported 23 O. R. 182, and was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ. A., and FERGUSON, J., on the 4th and 5th of October, 1893.

Moss Q. C., and J. Haverson, for the appellant.

I. F. Hellmuth, and W. E. Raney, for the respondent.

The decision turned mainly upon the facts, which are stated sufficiently in the report below, and in the judgments in this Court, and the cases cited are also there referred to.

There was a cross-appeal by the liquidator as to certain shares transferred by Dr. Sloan before the winding up proceedings.

January 8th, 1894. OSLER, J. A. :—

The appellant has been held to be a contributory in respect of 126 shares of the capital stock of the company; first by the Master in Ordinary, and afterwards by Meredith, J., on appeal from the report. His case is that he holds these shares as paid up shares, constituting part of the consideration received by him for the factory site sold to the company, while the contention of the liquidator is that he holds them as such without consideration, the

property being really the company's own property acquired for the purpose of being transferred to them, and that the appellant was a mere trustee of it for them, subject to repayment of his own advances in respect of it, which advances, less the sum of \$300, were in fact received by the appellant out of the proceeds of a mortgage which he made upon the property.

Judgment.

OSLER,
J.A.

It is necessary to get a clear view of the principal facts and dates in order to arrive at a proper conclusion as to the position of the appellant. It is little to the purpose to say that he was a promoter of the company, for, as has been more than once pointed out, that is an ambiguous term, and calculated to mislead, and it is necessary to ascertain in each case what the so called promoter did before his legal liabilities can be accurately ascertained. In every case it is better to look at the facts, and ascertain and describe them as they are: *Lydney and Wigpool Iron Ore Co. v. Bird*, 33 Ch. D. 85. In a case like the present the liquidator must make out that at the time the purchase was made the appellant stood in such a position that he could not claim to have bought the property for himself; in other words, that he was not in a position to sell it to the company when afterwards formed, because that company came into existence with the right to say that the purchase was made by the appellant for it, and not for himself. This, it appears to me, must generally be a task of some difficulty, at all events where the property has not been expressly purchased for the purpose of being transferred to the intended company, or where it is not made to appear that at or before the time when the purchase was made the purchaser has invited the public to come in and join the prospective company. The purchaser who buys in his own name, and expends his own money and means, as this appellant did, in acquiring the property, must be clearly shewn to have acted in a fiduciary relationship to the company,—to use that expression—before he can be held to have lost the right to deal with the property as his own. He may not have intended to retain it, or to work it himself,

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OSLER,
J.A.

or he may have contemplated forming a company to buy it from him, but this does not make him a "promoter," no matter how soon after the purchase the company is formed, in the sense of being trustee for, or as standing in a fiduciary position towards the company : *Ladywell Mining Co. v. Brookes*, 35 Ch. D. 400 ; *Gover's Case*, 1 Ch. D. 182 ; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, at pp. 1234, 1235, *per* Lord Cairns.

In this case we find that some persons named Hess, who had failed in business, were anxious to make a new start, but having no means of their own were unable to do so in their own names. In casting about for the best way to get a site on which to build a factory they found it necessary to invoke the aid of the name and means of the appellant, who was the father-in-law of E. G. Hess. Hess had ascertained that if a factory could be built thereon, a piece of ground could be obtained in the town of West Toronto Junction practically for nothing, and the appellant, who had no intention of erecting or working a factory, was, with some reluctance, persuaded by Hess to allow his name to be used in acquiring the land, and also to advance the necessary funds, or most of them, for building the factory, on the assurance that a joint stock company could be formed to take it over if it was satisfactory when built. All the arrangements for acquiring the land were made by Hess, who seems to have had a power of attorney from the appellant to act as his agent, and Hess settled the terms of the agreement, merely sending it forward to the appellant for his signature.

The agreement bears date the 23rd of September, and thereby it was agreed between him and the vendors that the land should be conveyed to him in fee simple if a factory was built thereon in seven months from date, and in default for \$3,000 cash.

The date of the actual conveyance is not shewn, but it was probably some months later.

About a week after the contract, viz., on the 30th September, 1889, notice of an application for a charter for the

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OSLER,
J. A.

company was prepared and published, and the subscribers for stock were therein stated to be the appellant, to the extent of \$7,500, and four others, two of them being the wives of the Hesses, and the appellant was named as one of the first directors. The building of the factory was proceeded with under the superintendence of the Hesses, who devoted their own time and labour to the purpose, E. G. Hess drawing upon the appellant from time to time for, or otherwise procuring from him, the necessary funds, and they also procured further moneys to a considerable amount through their female relatives, who were also shareholders in the company. The company's charter was issued on the 27th November, 1889, while the factory was in course of erection, and a fact may be noticed which certainly coincides with what appears to have been the intention of the parties when the agreement was signed, viz., that on 14th October, 1889, Hess addressed a letter in the name of Dr. Sloan, the appellant, "agent for the Hess Manufacturing Company of West Toronto Junction, Limited," to the town clerk, requesting that "as we intend to commence operations immediately," a hydrant might be placed in a "suitable place on our property."

Dr. Sloan remained one of the charter directors until the month of January, 1890, and at a meeting held on the 27th of that month, when a new board of directors was appointed, an agreement was made between him and the company for the sale by him to the company of the land and buildings for \$25,000, payable as follows: the company to assume the mortgage of \$7,000 on the land, and to issue to Sloan \$18,000 of paid up capital stock of the company, the subscription of \$7,500 by him to be included therein.

A resolution was passed accepting these terms, in the terms of which a by-law was subsequently passed, and \$18,000 of paid up stock entered in the books to the credit of the appellant.

Some time after the passage of the above resolution a prospectus was prepared, dated 15th March, 1890, inviting subscriptions to preference stock, and stating, *inter alia*,

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**OSLER,
J.A.**

that the company had erected the building described therein at a total cost, including land value, of \$25,000. The financial statement appended places the assets in land and buildings, at cost, \$25,000; machinery, \$5,000 = \$30,000; and the liabilities: mortgage on land and buildings, \$7,000; 460 paid up shares, \$23,000; total, \$30,000.

For the statement in the prospectus that "the company had erected" the buildings I apprehend that the appellant, then no longer a director, and having agreed to sell the land to the company, could hardly be treated as responsible.

Upon the fullest consideration of the evidence I am of opinion, with all respect to the Court below, that the character of promoter has been improperly fastened upon the appellant at a time when it did not in fact belong to him. Sufficient attention has not been paid to this point, and the result is that the appellant, who may properly enough be said to have become a promoter of the company subsequently to the date of the agreement under which he acquired the land upon which the factory was built, has been visited with consequences which ought only to have followed if it had been proved that he was a promoter at the date of that agreement.

The case is not that of a promoter or director, or other person standing in a fiduciary relation to the company secretly selling to them his own property, and concealing from them facts connected with it which might influence them in deciding upon the reasonableness of acquiring it. It is simply a case in which the company say to their shareholder: "The property you have applied in paying for your shares was not yours but ours." I fail, I confess, to see how it can be said that when this company was created it was in justice or equity the owner of the property, and entitled to call for a conveyance of it to them, for that is what their present contention comes to. It appears to me, on the contrary, that the appellant's true position is more properly described in the language of Lord Cairns, when speaking of that of Erlanger and his associates in *Erlanger v. New*

Sombrero Phosphate Co., 3 App. Cas. 1218, at p. 1235.

"The syndicate," he says, "in entering into this contract acted on behalf of themselves alone, and did not at that time act in, or occupy, any fiduciary position whatever. It may well be that the prevailing idea in their mind was, not to retain or work the island, but to sell it again at an increase of price, and very possibly, to promote or get up a company to purchase the island from them; but they were, as it seems to me, perfectly free to do with the island whatever they liked; to use it as they liked, and to sell it how, and to whom, and for what price they liked."

And in *Gover's Case*, 1 Ch. D. 182, James, L. J., says, (at p. 188): "No impropriety in the contract"—he is alluding to the possibility of the contract by which the property afterwards sold to the company was acquired containing stipulations wrongful or injurious to the company—"can make it the contract of the company, or the contract of a promoter, trustee, or director of a company, when at the date of the contract there was no company, no promoter, no trustee, no director. The character of the contract cannot operate as a transformation of the contracting parties."

These two cases, and *Ladywell Mining Co. v. Brookes*, 35 Ch. D. 400, already noticed, are, it appears to me, strong authorities against the contention of the liquidator here; and I refer also to *In re Ambrose Lake Tin Mining Co.*, 14 Ch. D. 390; *In re British Seumless Paper Box Co.*, 17 Ch. D. 467.

There may have been, perhaps it may even be said that there was, an intention on the part of the appellant that the property should be conveyed to a company when formed. But this is not enough to fix him with the character of a promoter, or to place him in the position of one holding a fiduciary relationship in respect of such property.

It may be that the Hesses and their wives would be entitled as against the appellant to say that they had some interest in the property, the husbands having expended their time and labour, and the wives their money upon it,

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OSLER,
J.A.

sequently there can be no ratification—i. e. approval by him of something previously done for him. A company, therefore, cannot, properly speaking, ratify what its promoters have done before its formation. But a company may after its formation become bound to do what others have undertaken it shall do when formed. It may become so bound by its charter or act of incorporation, or by a valid contract entered into by itself after its formation." Some of the cases on which this statement of the law depends are the following: *Kelner v. Baxter*, L. R. 2 C. P. 174, 185; *Scott v. Lord Ebury*, *ib.*, 255, 267; *Melhado v. Porto Alegre, etc. R. W. Co.*, L. R. 9 C. P. 503; *In re Empress Engineering Co.*, 16 Ch. D. 125; and *In re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16. In the present case, there was nothing in the charter, nor any subsequent contract entered into with the company, to take it out of the rule, and if the appellant had ever so much professed or declared himself to be acting as agent for the company in making the purchase, it would have amounted to nothing, and the company could not have bound him or themselves or the persons from whom he bought by any act of ratification.

Judgment.

 MACLENNAN,
 J. A.

But then, it is said, that the appellant was a promoter of the company, and therefore a trustee. No doubt, he was a promoter, but when did he become one? Not till the 30th of September, a week after he had bought the property. On that day he became a party to an advertisement in the *Gazette* of an intended application for a charter, but neither in the advertisement nor in the petition, dated on the 22nd November, nor in the charter itself, is there any reference to this property. The charter applied for and obtained, was merely a charter for a company, with power to manufacture and sell all kinds of furniture, nor does the contract contain any reference to the company, so that in no sense can it be regarded as an act of promotion. The conclusion is, therefore, in my judgment, clear, that when the property was bought, the appellant was not a promoter, and that no inference of a trust for the com-

Judgment.

MACLENNAN,
J.A.

pany in respect of the property can properly be drawn from that relation. If the charter had expressed that the company was formed for the purpose of taking over the property, or if the contract had expressed that it was bought for or in trust for the company, something might be said in favour of the contentions of the respondent; but there was nothing of that kind either in the charter or in the contract, and the contract is, in form and substance, in the name and for the benefit and on the responsibility of the appellant alone.

What is sought to be made out here is a trust of property. Now, I do not understand the law on that subject to be different in the case of a company from what it is in other cases, or that such a trust can be established against the promoter of a company in any different way from what is required in the case of private persons. The suggestion is, that because the appellant was a promoter of the company at or shortly after the time when he bought the property, he stood in a fiduciary relation to the company, and, therefore, became a trustee of the property in question for them. But a person who is an undoubted trustee for another may still buy property which is unconnected with the existing trust, in his own name, with his own money, and for his own benefit, and it requires the same evidence to make him a trustee of such property as if he were no trustee at all. Therefore, I think, that the mere fact that the appellant became, and was at, or soon after, the time he bought this property, a promoter of the company, is wholly insufficient to fix him as a trustee for the company in making the purchase, either at the time when he made it or afterwards.

Then is there anything else in the case to fasten a trust upon this property in the hands of the appellant in favour of the company at any time? I have read the evidence very carefully several times, and I am unable to find anything which, upon any recognized principle of law or equity, is sufficient for that purpose. The most that can be said is that there was from the beginning a general in-

tention in the minds of the appellant, and the Hesses, to form a company for the purpose of taking over the property with the factory which was to be erected thereon, but the transfer of the property, and the terms on which it might be made, were to be matter of future consideration and arrangement, in respect of which there was no legal or equitable obligation either on the part of the company or on the part of the appellant or his friends. I think it is entirely out of the question to say that a mere intention, existing only in the minds of the appellant and his friends, were it ever so clear and strong, would make the appellant a trustee for the company in respect of this property. I know of no principle relating to contracts or trusts on which to rest such a proposition.

Judgment.

MACLENNAN,
J.A.

I think, therefore, the property belonged to Dr. Sloan, at the time of the purchase by him, free from any trust for the company and that it continued to be his until the 27th of January, subject to the mortgage which he had made for \$7,000. Besides having made this mortgage, he was also, perhaps, a debtor to the other parties for the money and services which they had contributed to the building of the factory. But we are not now concerned with that. It was a matter between themselves, and they all seem to have looked for reimbursement out of the proceeds of the sale. This was the state of things when the transaction of the 27th of January occurred, by means of which the company acquired the property. The resolution of the shareholders which was adopted on that day was afterwards carried into effect by conveyance, and the issue of the shares to the appellant as paid up shares. If the property was Dr. Sloan's, and if the company bought it, they cannot retain it and repudiate the consideration which they gave for it. If they keep the property, then Dr. Sloan must also be allowed to keep the shares as paid up shares, unless it was illegal to pay for property in paid up shares, which has not been contended. The whole ground of the action was that the company had bought its own property from Dr. Sloan, and that, therefore, there was no consideration for the

the mortgage. Instead of the mortgage being made over, to the company which was to have the benefit of his own property, to which it was to be applicable. Such a sale of property, if it be a sale of fraud or deceit, is per se void. It is not a sale of property, but a sale of property, which is to be set aside the sale. It is declared that there was no property belonged to the

Sombrero Phosphate Co., & very much relied on by the court in his favour, I think it is a strong case. Erlanger was an agent to form a company to purchase a large part of his scheme in Cairns, in his judgment of the property, he and his agents, by any fiduciary position, their purchase was made, whatever they liked, to purchase, and to whom and to whom. *Well Mining Co. v. Brooks*, & *Averson*, is another case, a stronger case in its circumstances, in favour of the view of the company, and it was

of the property on certain conditions, the transaction has no effect in, that all the shares of his original subscription were paid up shares.

The order appealed from, the learned Master, must be

FERGUSON, J.:—

Judgment.

FERGUSON, J.

I agree in the conclusions arrived at by Mr. Justice Oslar, and Mr. Justice Maclellan, and for this reason I do not feel called upon to write here at as great length as perhaps I otherwise should.

The ground on which it is sought to make the appellant Dr. Sloan liable as a contributory is, as it is alleged, that the 126 shares alluded to have not been paid for, and are not "paid up" shares. I need not state how these shares came to be separated or singled out from the larger number of shares, as this has been done in former judgments. It was not disputed that when the company is one incorporated under the Ontario Act, as this company was, payment for shares may take place in kind, as well as in cash.

The contention of the appellant is that these, as well as the other shares, were fully paid for by the conveyance of the property, the factory, on the 21st day of March, 1890, to the company, the respondents contending that this could not be the case because the property was then already the property of the company, a proposition that could only be made out by shewing that the purchase of the property by the appellant was in law, that is, in view of a Court of Equity, a purchase for, on behalf of, or for the benefit of the company, and this could only rest upon the existence of a trust or such a fiduciary relationship between the appellant and the company at the time of the purchase by the appellant as would entitle the company to say that the purchase was really for them. Nothing appears to have occurred after the purchase by the appellant, and before the conveyance by him to the company, to entitle the company to say that they were the owners of the property at law or in equity, if it is assumed that the company did not become such owners by virtue of the purchase by the appellant Dr. Sloan.

Mr. Hellmuth, counsel for the respondent, during his argument, plainly asserted that the property was the property of the company at the time of the sale and convey-

Judgment. **ANCE** of it to them by Dr. Sloan; and further said and **FERGUSON, J.** conceded, that if this were not so, he could not succeed in his contention on behalf of the respondent; saying afterwards in his argument that the case *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, was the strongest authority in favour of his contention in this regard.

One is pleased to observe in reading the judgments of the learned Master and my brother Meredith, that notwithstanding Dr. Sloan's large interest in the contention the fullest credence seems to have been given to his testimony. What he says on the immediate subject is, that when Hess was talking with him respecting the building of a factory, and after he had told Hess that he did not want to run a factory, Hess said to him that the project was that when the factory was erected, if it was satisfactory, there could be a joint stock company formed to run it, and that was the object with which he went into the enterprise.

Again, he says: "Of course when I agreed to erect the factory I said I would not run it, and they said they could form under the Limited Liability Act a stock company to run it." He further says that there was no agreement between him and Hess, or anybody else, which compelled him to build the factory. He says that there was no agreement to the effect, but there was an understanding that they (the Hesses I think) were to form a joint stock company to take the factory after it was put up.

Emile Hess says, being asked: "Now, you had the establishment of a joint stock company in your mind from the very time you went out there in the first instance? Not at all, we were talking that we were wanting to establish a company. My father and I wanted to get into work of some kind, but we didn't say. I told him (Dr. Sloan) that the probabilities were that a joint stock company would be formed."

It seems to be under these circumstances that the appellant purchased the land on which he erected the factory that he afterwards sold and conveyed to the company. A passage in the head note of the case *Erlanger v. New*

Sombrero Phosphate Co., 3 App. Cas. 1218, is : "Persons Judgment.
who purchase property and then create a company to pur- FERGUSON, J.
chase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it." But that statement does not appear to me to apply to the present case. True it is, that the contract of sale to the company was not in that case sustained, but the decision proceeded upon the facts of the transaction of the sale of the property to the company.

In the present case, it is conceded that there cannot be a rescission of the sale by Dr. Sloan to the company, and there does not appear to me to be any good ground for such a rescission, even if, in the circumstances, it could take place. Looking at the facts of that case, so far as they appear to shew any relationship between the purchase by the syndicate and the sale to the company subsequently formed, as stated by Lord Penzance, at p. 1227, and by Lord Cairns, at p. 1235, and what is said by the other learned Judges, one would say, that in that case there were stronger grounds for saying that there was a relationship creating a fiduciary character, a trust, than there are in the present case, and yet, it was held, that there was not a fiduciary relationship or trust such as would entitle the company to say that the property had been purchased by the syndicate for them, or that the company was entitled to any advantage or profits arising from the purchase by the syndicate. The learned Judges seem to be most emphatic in stating this, and it seems clear to me, that although the sale to the company was not, for the reasons I have before alluded to, sustained, yet the branch of that case that has any application to the matter at present in contention here, instead of being an authority against the appellant, is an authority strongly in his favour. I may here refer to the language of Lord Cairns on this subject, at p. 1235; Lord Hatherley, at p. 1242; and Lord Gordon, at p. 1283.

Judgment In the case *Ladywell Mining Co. v. Brookes*, 35 Ch. D. **FERGUSON, J.** 400, decided by the Court of Appeal, it was, as in the present case, not possible to rescind the contract of sale to the company, and a trust or fiduciary relationship in the acquiring of the property by those who sold it to the company was sought to be made out so as to entitle the company to what were called the "secret profits," made by the vendors on their sale to the company. In that case the law on the subject seems to have been very thoroughly examined, and the plaintiffs' case failed. The case seems to me much like the present case. I may refer to a passage in the judgment of Cotton, L. J. (p. 409): "It is undoubted that at that time—the first of February, (this was the time of the purchase by those who sold to the company) and even before that—Palin and his friends did contemplate forming a company, and did contemplate not themselves working this mine, but dealing with it in the way of selling it at an increased price to the company to be formed. But no part of that purchase money was to be provided for out of the funds of the company, or to consist of shares in the company; and, in my opinion, it is not sufficient for the appellants to shew that it was contemplated that the company should be formed, or even that it was contemplated at the time when Palin bought this mine that he should sell to a company, and that he should not work it himself," the learned Judge referring to *Gover's Case*, 1 Ch. D. 182, and *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218.

After having been at some pains in examining the authorities referred to by counsel, in what I consider able arguments, I have not found any statement or exposition of the law upon the precise subject in hand here at variance with the cases I have referred to above, and it is to be borne in mind, that one of these cases is in the House of Lords and the other in the Court of Appeal.

I agree that the appeal should be allowed.

HAGARTY, C. J. O. :—

Judgment.

HAGARTY,
C.J.O.

I give my opinion with some distrust of my own judgment, as it is opposed to that of the majority of the Court.

I agree, however, in the conclusions arrived at by the learned Master in Ordinary, and affirmed in the Court below by Mr. Justice Meredith.

The position of Doctor Sloan in the acquisition of the land for the factory, and in the contemporaneous formation of the joint stock company, is very clearly shewn, and is admitted by himself with commendable frankness.

He may have been a mere instrument in the hands of the Hess family, but all the evidence on this head seems to me irresistibly to shew that he was not acting as an independent purchaser of property, or as builder of a factory, but for the express purpose of the use and business of a company then in process of formation.

That Dr. Sloan comes within the definition given of a promoter of this company, seems to me to be beyond all doubt.

He tells us distinctly that he had no idea of personally entering into any furniture business, or of erecting or running a factory for any such purpose, he only wanted to help his son-in-law and his father.

The idea was first started by his son-in-law E. Hess, who came to him and suggested the formation of a joint stock company ; that he should lend his name, and find the means to build the factory and procure a site ; that he agreed, and his son-in-law went to procure a site. At this time the appellant lived in the county of Huron.

E. Hess accordingly bought the land in the appellant's name by contract dated 23rd September, 1889. The expressed consideration was that the appellant should put up a factory within a named time, if not, he was to pay \$3,000 for the land.

On September 30th the appellant signed the petition for the letters patent.

The factory was erected by the appellant's money, his

Judgment.

HAGARTY,
C.J.O.

son-in-law apparently managing the affair, and drafts on the appellant for the outlay were honoured by him.

On October 14th we find E. Hess writing to the municipality asking for hydrants to be placed for use of the premises. He signs the letter in the appellant's name as agent for the company.

On the 27th November the charter was granted. It recites the petition of the appellant and others, and states that he has subscribed \$7,500 of stock—nothing paid thereon.

He was named a director, and so continued to 27th January.

I take from the learned Master's report what was next done:—

“The factory was built at a cost to Dr. Sloan of about \$7,300, to which further sums were contributed by members of the Hess family, and the land was thereupon conveyed to Dr. Sloan free of the charge of \$3,000. Dr. Sloan then mortgaged the property for \$7,000, which repaid all his advances except about the sum of \$300. While the factory was being erected Dr. Sloan and others applied for a charter of incorporation for the ‘Hess Manufacturing Company of West Toronto Junction, Limited,’ and in November, 1889, Letters Patent were issued incorporating the company, and constituting Dr. Sloan one of the directors. He appears to have held office as such director up to the 27th January, 1890, when a new board was elected at a meeting of the shareholders. At the same meeting, at which he has been stated to have been represented by his agent, the following agreement is recited in one of the resolutions entered in the minute book (p. 401): ‘Whereas arrangements have been made with Dr. William Sloan, of the village of Blythe, in the county of Huron, for the purchase for the purposes of the company of part of lot one in the town of West Toronto Junction (describing it); And whereas the said Dr. Sloan has agreed to sell such land and buildings to the company for the sum of \$25,000, payable as follows—The company to assume a

mortgage of \$7,000 on the said land, and to issue to the said Dr. Sloan \$18,000 of paid up capital stock of the company; the subscription of \$7,500 of the said capital stock by Dr. Sloan to be included in such issue of paid up stock for \$18,000, and such subscription of \$7,500 to be merged therein; Resolved that the shareholders accept the terms of sale as herein stated with the said Dr. Sloan, and the directors of the company are hereby empowered and authorized to carry out such purchase and pass any necessary by-laws, and execute all documents, and make such entries in the books as are necessary to effectuate the same.' A by-law was subsequently passed in the terms of this resolution, and \$18,000 worth of paid up shares in the capital stock of the company were entered in the books to the credit of Dr. Sloan. There were four persons present at the meeting of the 27th January, 1890, viz.—H. B. Morphy, E. G. Hess, William Hess and Elizabeth Hess, and E. G. Hess as proxy for four others. Dr. Sloan states that he did not know how the figures were arrived at. With the exception of the sum of about \$300 all advances by Dr. Sloan for the building of the factory had then been repaid by the mortgage loan of \$7,000 assumed by the company. The liquidator contends that Dr. Sloan gave no consideration for the \$18,000 worth of paid up shares in the capital stock of the company, and that he is now liable to pay that amount as a shareholder in the company."

Judgment.
HAGARTY,
C.J.O.

On the 21st March there was a meeting of directors: present, W. Hess, E. Hess and W. Sloan, a son of defendant. The by-laws were considered, and a special general meeting of shareholders was called for April 26th.

There is an entry in the margin of the minute book that the by-laws were confirmed at a shareholders' meeting on April 26th, but no entry of such meeting appears. And another marginal note, at p. 16 of the minute book, makes a like statement as to a meeting of shareholders on the 28th April, but no formal entry appears.

No evidence shews any meeting of shareholders called

Judgment. or held for approval or disapproval of the purchase from
HAGARTY, Dr. Sloan, amounting to a valid ratification of what was
C.J.O. done.

I do not think it necessary or relevant to discuss the question of the value of the property conveyed by the appellant to the company.

It is established, I think, very clearly, that the property was acquired for the express purpose and use of the company to be formed; that the appellant was a joint adventurer in the proposed undertaking; and in the words of Cotton, L. J., "any purchase made by him of property available for the company must be considered as a purchase made by him as a trustee for the company."

The principles governing such a case as that before us are set forth very luminously in such cases as the well known *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, followed by many others noted in the judgments below.

The appellant being placed in the fiduciary position, cannot derive any profit or personal benefit from his purchase. The company take it from him at cost. He is to be relieved from all lawful expenditure by him in its acquisition, but he cannot receive or retain as paid up shares in the joint adventure a sum of some \$18,000 over his expenditure on the joint account.

I refer to some remarks of Lord Blackburn, at p. 1273, as to the propriety of having an unbiassed board of directors to form a proper judgment on such a matter as this purchase.

The term "promoter" has been often defined. In Healey's *Joint Stock Companies*, 2nd ed., at p. 33, many instances are given. In England it has a statutable definition; it is "to apply to every person acting by whatever name in the forming and establishing of a company at any period prior to the company obtaining a certificate of complete registration."

In *Emma Silver Mining Co. v. Lewis*, 4 C. P. D. 396, Lindley, J., says (p. 407): "As used in connection with com-

panies the term 'promoter' involves the idea of exertion for the purpose of getting up and starting a company (of what is called, 'floating' it), and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it."

Judgment.

HAGARTY,
C.J.O.

In *In re Ambrose Lake Tin Mining Co.*, 14 Ch. D. 390, at p. 398, Cotton, L. J., says: "(If) at the time the so-called vendor acquired the property he either acquired it for the company, or was in such a position of fiduciary relation to the company that any purchase made by him of property available for the company must be considered as a purchase made by him as a trustee for the company; in that case what the Court does is to go back to the original purchase made by the person who afterwards purports to sell to the company at an advanced price, and to say this was already the company's at the price which you originally gave for it when you were a trustee for the company. That price you are entitled to receive out of the coffers of the company, and anything else is a sum paid to you for nothing which you are not entitled to retain."

This case is commented and relied on by Pearson, J., in *In re Cape Breton Co.*, 26 Ch. D. 221, at p. 230. See also the same case, 29 Ch. D. 795, and in the Lords, *sub nom. Cavendish v. Fenn*, 12 App. Cas. 652, and *Ladywell Mining Co. v. Brookes*, 35 Ch. D. 400. See also *Bland's Case*, [1893] 2 Ch. 612.

I refer also to the remarks of Cotton, L. J., in *Bagnall v. Carlton*, 4 Ch. D. 371, at p. 406, and as to the rights of future shareholders: Lindley's Law of Companies, 5th ed., p. 370, and *per* Sir Geo. Jessel, M. R., in *Erlanger v. New Sombrero Phosphate Co.*, 5 Ch. D. 73, at p. 113.

I hold the appellant liable to pay the shares held by him over and above the shares to recoup him up to his expenditure for the purposes of the company.

I consider him as proved beyond controversy to have acquired the property as a promoter or agent for the common purposes of the company which he was actively engaged in getting up, and that he could not claim or hold it as

Judgment.

HAGARTY,
C.J.O.

exclusively his own ; that before and at the time of his entering into the contract of purchase he was engaged in getting up such company, and that whatever might be its value it was all for the benefit of his co-adventurers ; that he was a provisional director from the beginning and during the erection of the factory.

In the prospectus issued 15th March it is stated that the value of the land and buildings "at actual cost to the company" was \$25,000. The true cost should have been something over \$7,000.

A week after this (21st March), the appellant conveyed this property to the company. Most of the other existing shareholders, chiefly the relatives and members of the Hess family, seem to have fully approved of all this.

We have to look to the interest of future shareholders ; the directors owed a duty to them beyond that to the other nominal shareholders.

When the company is to be wound up, and the assets are to be made available as far as possible for payment of creditors, it becomes an important enquiry whether a quantity of shares stated to be paid up are really entitled to be treated as such.

I fully accept the test suggested by Cotton, L. J., in *Ladywell Mining Co., v. Brookes*, 35 Ch. D. 400, at p. 411 : "In my opinion it must be for the plaintiffs to make out that at the time when this purchase was made, Palin and his friends (the purchasers) were so acting (I do not call them by the name of 'promoters'), as that they were in a position which prevented them, if the company was afterwards formed—and I do not make any distinction between the company intended at the time and any company to be formed—from selling the mine to the company, because the company had already acquired a right to say that the purchase made by them was made for the company."

I rest my opinion wholly on the ground on which this very learned Judge places the right to recover.

My difference with my learned brothers is simply in our respective views of the evidence.

If that evidence do not shew that this appellant did buy for the intended company, and did expend his money in erecting the factory for the company after the organization of the company, then I am unquestionably wrong.

Judgment.

HAGARTY,
C.J.O.

Appeal allowed with costs,
HAGARTY, C. J. O., *dissenting.*

MCKIBBON V. FEEGAN.

Life Insurance—Husband and Wife—Will—R. S. O. ch. 136, sec. 5—Executors and Administrators—Form of Judgment—Plene Administravit—Assets Quando.

A bequest of a policy of life insurance to the testator's wife is a valid declaration of trust within the meaning of R. S. O. ch. 136, sec. 5.

Re Lynn, Lynn v. Toronto General Trusts Company, 20 O. R. 475, and *Beam v. Beam*, 24 O. R. 189, approved.

Judgment of the County Court of Prince Edward on this point affirmed, OSLER, J. A., dissenting.

The practice in force before the Judicature Act, under which a plaintiff taking issue on and failing on an executor's plea of *plene administravit*, could not have judgment of *assets quando*, no longer exists, and it is now proper to give a plaintiff judgment of *assets quando*, if his debt be established and such a judgment be desired.

Judgment of the County Court of Prince Edward on this point reversed.

THIS was an appeal by the plaintiff from the judgment of the County Court of Prince Edward. Statement.

The defendant was the executrix of the will of John W. Feegan, and the plaintiff brought the action to recover the sum of \$116.75, alleged to have been due by the testator to him.

The defendant admitted that she was executrix but disputed the indebtedness and pleaded *plene administravit*. There was no formal joinder of issue, and the action came

Statement. on for trial on the 14th of June, 1893, at Picton, before his Honour Judge Merrill. The debt was contested but sufficiently established; and there was also a contest as to the existence of assets. It was shewn that the testator, while married, had effected two policies of insurance on his life, one of which was, in terms, payable to the defendant, and the other to the testator. By his will, made on the 23rd of March, 1892, he directed all his just debts, funeral and testamentary expenses, to be paid and satisfied as soon as conveniently might be after his decease, and then proceeded as follows:—

“Save and except as hereinafter mentioned, I give, devise and bequeath all my real and personal estate, of which I may die possessed of or interested in the manner following, that is to say, unto my beloved wife Eliza Feegan, so long as she shall remain my widow, and in the event of her marriage, the said property, real and personal, shall be equally divided between such of my children as shall be living at the time of her marriage, and in the event of her never marrying after my decease, she shall have full and absolute power and authority to dispose of my said property, real and personal, by will, as to her shall seem best.

The policies of insurance I hold in the Ancient Order of United Workmen and the Select Knights, in all amounting to \$4000, shall pass under the above bequest, and all other property, real and personal, shall also pass thereunder, save and except my chest of joiner's tools, which I especially give and bequeath unto my son Benjamin Feegan, absolutely.”

The learned County Court Judge held, following *Re Lynn, Lynn v. Toronto General Trusts Company*, 20 O. R. 475, that the will constituted a declaration by the testator that the policy in question was for the benefit of his wife. It was admitted that no other assets had come to the hands of the defendant, and the learned Judge dismissed the action with costs, reserving leave to the plaintiff to bring another action if assets should thereafter be discovered.

The plaintiff appealed, and the appeal was argued before **Argument.**
HAGARTY, C. J. O., and OSLER, and MACLENNAN, JJ.A., on
the 16th of November, 1893.

C. H. Widdifield, for the appellant. The learned County Court Judge has followed the case of *Re Lynn, Lynn v. Toronto General Trusts Company*, 20 O. R. 475, but that case is distinguishable, because the certificate of insurance in question there was, on its face, payable to the devisees of the insured. If that case has the effect of deciding that a bequest by will is a sufficient declaration within the statute, it is submitted that the decision is wrong. The statute clearly contemplates some irrevocable declaration of trust and not a mere revocable instrument, such as a bequest by will would be. If, however, a bequest by will could, under any circumstances, be sufficient, the bequest here in question is not enough. The direction as to payment of debts is the key to the interpretation of the will, and these policies are given as assets for the payment of debts. At any rate, the Judge was wrong in dismissing the action with costs. He should have entered judgment in favour of the plaintiff assets *quando* with costs, giving to the defendant, if he saw fit, the costs of the issue on which she succeeded.

Hoyles, Q.C., for the respondent. It was shewn that there were no assets except the policy in question, and it was therefore useless to give a judgment assets *quando*. Besides, the plaintiff took issue on the plea of *plene administravit*, and it was too late after failing on that plea to ask for judgment of assets *quando*: Williams' Law of Executors, 7th ed., p. 1979. On the question of the effect of the bequest of a policy, the decision is clearly right. The *Lynn* Case is directly in point, and is rightly decided. The language of the Act is very wide. It speaks of an "instrument in writing" which a will of course is, and the possibility of revocation is no objection. The will would only take effect from the time of death, and therefore when it once takes effect, it is irrevocable. If the will is

Argument. revoked in the lifetime of the maker, then, of course, there is no declaration of trust. It is only at the time of the testator's death that the question can arise at all, and then the irrevocable instrument points out the destination of the insurance moneys. 'The mere naked direction to pay debts cannot be construed to be a devise of the policy in trust for that purpose.

C. H. Widdifield, in reply.

December 22nd, 1893. HAGARTY, C.J.O. :—

Not without some hesitation I have arrived at the conclusion that this appeal fails.

The Legislature has sanctioned the principle that a man may provide for his wife and children at the possible expense of his creditors, and may devote his earnings to keep up insurances which are unassailable by those to whom he may be, or may die, heavily indebted.

Section 5 of R. S. O. ch. 136, allows a man to endorse upon any policy effected by him on his life, or to make by any writing identifying the policy by number or otherwise, a declaration that the policy is for the benefit of his wife, or of his wife and children, and declares that such policy shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children, etc., and that the money payable thereunder shall not be subject to the control of the husband or of his creditors.

The learned Chancellor has decided that it is sufficient to make the declaration as to an existing insurance by will.

Looking at the general scope and bearing of the legislation, I am unable to say that such decision is wrong.

There is no doubt but that our so holding may have the effect of, in some cases, making the trust for his wife and children revocable, which it might not be when endorsed on the policy under the statute.

So long as it can be done by will, it must necessarily be revocable. The answer would seem to be that it can only be effectually done by a last will.

Here the testator could have had the trust endorsed or made the necessary declaration effectually the day before he died.

Judgment.

HAGARTY,
C.J.O.

I do not see my way to holding that he cannot equally do so by will. His death closes all question of revocation.

He could equally defeat all claims of creditors by making the required endorsement or declaration as by making it by will.

His making the declaration in the present form is worthless unless and until it appears as his last will, and as an irrevocable creation of the trust.

I cannot see that in substance, a revoked will differs from an ineffectual or defective attempt to declare a trust on an existing policy.

On the whole, I agree in substance with the learned Chancellor's judgment.

OSLER, J. A. :—

I am of opinion that the defendant fails on the defence of *plene administravit*.

The testator had, in his lifetime, effected two policies of insurance on his life: one in a society called the Ancient Order of United Workmen, which, by its terms, was payable to his wife, the defendant, and respecting which no question arises; and another in an Association called the Select Knights, of some unknown Order. By his will he devised and bequeathed his estate as follows (reading the will as already set forth).

The defendant, relying upon the bequest to her in the will of the policy in the Select Knights, as a declaration by the deceased of her interest in it within the meaning of R. S. O. ch. 136, sec. 5, contends that such policy is not part of the testator's estate, and if her contention is right, as the learned Judge of the County Court has held, there are, practically, no available assets, and her plea is substantially proved. That section enacts, that in the case of a policy of insurance effected by a man on his life, if he has heretofore

Judgment.

OSLER,
J.A.

fore endorsed, or may hereafter endorse, or by any writing identifying the policy has made or may hereafter make, a declaration that the policy is for the benefit of his wife, or of his wife and children, or any of them, such policy shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the intent so expressed or declared, and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors or form part of his estate when the sum secured by the policy becomes payable; but this shall not be held to interfere with any pledge of the policy prior to such declaration.

The endorsement or writing mentioned in this section, appears to me to import something by which a trust is irrevocably created for the beneficiaries therein named, subject only to be varied as by that section and section 6 is provided; something of efficacy as high, and dedication as final, as would be, by force of the same section, the expression of the trust in the body of the policy. The intention of the Legislature was that the policy so declared should be no longer available to the assured for his own purposes. He must determine what he will do in respect of it. He may take advantage of the Act and devote it to the use of the wife and children, in which case it is no longer subject to his control or that of his creditors, and it will not form part of his estate when the sum secured by it becomes payable. On the other hand, he may retain it within his own control so as, for example, to pledge it if need be, or assign it to his creditors, or deal with it in any other way in which a man may deal with his own property. If he only disposes of it by will, that is a form of disposition which does not come into effect until his death, and until that moment it has remained subject to his control and to the claims of his creditors, and when he died it formed part of the estate left behind him. That he had made a disposition of it by his will would be no answer to a creditor seeking the benefit of it in his lifetime, and it

seems very like begging the question to say that it is only his last will which takes effect, for the declaration which the fifth section speaks of is evidently one which takes effect from the moment it is made, importing something which has become effectual in the declarant's lifetime, not an instrument which only becomes irrevocable by his death, and which in the meantime leaves him the benefit of the policy for his own purposes, free to alter and revoke the declaration and make any other disposition he may please of it.

Judgment.

OSLER,
J.A.

The special power which the Act confers to vary and alter from time to time the appointment made by the original declaration is also strong to shew that such declaration is something which has taken effect in the declarant's lifetime, which the Act specially permits him, but only within certain limits, to modify. It is most significant that the Act says nothing about making a declaration by will. It would have been the most natural thing to provide for had it been intended that the insured should be able to retain the policy within his own control during his life, and then by his will withdraw it from his creditors. This too is emphasized by section 11, the only one in which a will is referred to. That section permits the assured by the policy or by his will or by any writing under his hand to appoint a trustee of the policy money, and from time to time to revoke the appointment in like manner and appoint a new trustee, etc. This is an instrument quite different from and for other purposes than the declaration. It is something revocable and apart from the irrevocable disposition which this section and the following assume to have been already made by the policy or other writing, but which, as regards the administration of the trust thereby created, may be thus controlled by the appointment of a trustee.

I refer also to sections 8 and 9 of the Act as consistent only with the construction which, I think, section 5 requires, namely, a declaration or disposition *inter vivos*, indefeasible, except within the limits specially permitted

Judgment.

OSLER,
J.A.

by the Act ; and section 23 should also be noticed, which enacts that nothing in the Act shall restrict or interfere with the right of any person to effect or assign a policy for the benefit of his wife and children, or some of them in any other mode allowed by law.

I have read the cases of *Re Lynn, Lynn v. Toronto General Trusts Company*, 20 O. R. 475, and *Beam v. Beam*, 24 O. R. 189, in which a different view of the Act is taken from that which I have expressed, but with all deference I am unable to agree with that view for the reasons above given.

The amendment made by 53 Vic. ch. 39 (O.) to section 5 of the principal Act, does not affect the construction of that section on this point.

Under the English Acts of 1870, 1882, the trust for the wife or children must appear on the face of the policy; there seems no power to make a subsequent declaration such as our Act admits of.

As I think the plaintiff ought to succeed altogether on the plea of *plene administravit*, it seems hardly necessary to express an opinion as to whether, assuming that he fails, he should still have judgment of assets *quando*. No doubt under the former system, where the plaintiff instead of submitting to the plea and taking judgment of assets *quando*, took issue and failed, the defendant was entitled, as he would still be entitled, to the general costs of the cause as having succeeded on a plea in bar, the action having been brought to recover judgment against and execution out of the assets.

But the plea was an admission of the debt, and whether the plaintiff submitted to it taking judgment of assets *quando* or took issue upon it, and was defeated, he was equally entitled, on assets subsequently coming to defendant's hands, to reach them by means of a *sci. fa.* So that it might be said that judgment of assets *quando* was appropriate in either case, though it may not have been usual to award it where the plaintiff chose to take issue. I do not find that actually decided in any case. But if a

sci. fa. would lie to reach subsequent assets as well where the plaintiff submitted to the plea as where he took issue on it and was defeated, I cannot see why judgment of assets *quando* might not have been awarded in both cases, if it was necessary in either. Under the present system there can be no reason why the judgment should not be moulded so that while the defendant is given all he is entitled to, that is, the general costs of the cause, the plaintiff should also have judgment of *assets in futuro* if he thinks it desirable, so as to reach them by means of a *sci. fa.*, or whatever is now the appropriate proceeding. I refer to *Edwards v. Bethel*, 1 B. & Ald. pp. 255, 257, *per* Manning, Serjeant, *arguendo*, and *per* Bayley, J.; Foster on Scire Facias, p. 201; Tidd's Practice, 9th ed., p. 1113.

Judgment

 OSLER,
 J.A.

I think the appeal should be allowed altogether and judgment entered for the plaintiff.

MACLENNAN, J. A. :—

I think that under the Judicature Act, and having regard to the change in the law making all debts of deceased persons in case of a deficiency of assets payable *pari passu*, R. S. O. ch. 110, sec. 32; *Bank of British North America v. Mallory*, 17 Gr. 102, the proper judgment in all actions in the High Court against executors or administrators, when there is a recovery of money, and assets are not admitted, is the judgment which was always pronounced in Chancery in such cases, namely, a judgment for payment in a due course of administration, or in other words, a judgment for the administration of the estate. But this is an action in a County Court which has no equitable jurisdiction, and in which therefore no judgment for administration could be pronounced.

The question, therefore, is, whether the defendant has proved her plea of *plene administravit*. The plaintiff has proved his debt, and unless the defendant has proved her plea, he is entitled to judgment.

Judgment.

MACLENNAN,
J. A.

The question turns in the first place upon this, whether a sum of \$2,000 received by the defendant on a life insurance policy in the name of her husband in a society called the Select Knights, is, under the will, assets in her hands for the payment of debts. It was contended that the writing mentioned in section 5 of the Act relating to insurances for the benefit of wives and children, whereby a declaration is authorized to be made in their favour, does not include a will.

The point has been decided adversely to this contention by the learned Chancellor in *Re Lynn, Lynn v. Toronto General Trusts Company*, 20 O. R. 475, and I agree with that decision.

The language used in the Act is, "any writing," which, in terms, includes a will, and unless some good reason can be assigned for excluding a will, a declaration by will must be within the Act. I am unable to discover any such reason. What is suggested is, that a will is revocable, and that the Legislature did not intend the declarations which it authorized to be revocable. I do not find anything in the Act which forbids a revocable declaration. There is nothing express to that effect, and I see nothing from which to imply it. The Legislature intended to enable a husband and father to make a provision for his wife and family, for their benefit after his death, and not before. He may make it at any time; may wait until he is *in extremis*, and if he might, as he may, make it by writing other than a will just before death, why might he not do it by will? The Act enables him to settle the whole policy, or several policies. Why should he not therefore be able to settle part of a policy, or the whole policy, for a limited time, as for a year or two years in case of his death during that period, but not afterwards? I see no evidence in the language used that the Legislature intended to limit or restrict the power of settlement on the part of the husband in favour of his wife and children. He may settle it absolutely, and as the greater includes the less, I think he may settle it with any quali-

fication not expressly forbidden. It may be argued, that section 6, and the amendment thereof, by 51 Vic. ch. 22, sec. 3 (O.), and 53 Vic. ch. 39, sec. 6 (O.), indicate the intention of the Legislature that the settlement authorized by section 5 was to be an absolute and not a revocable settlement. I think the answer to that is that section 6 is intended to enable the settlor to change and vary the settlement, even in those cases in which he has made it absolutely and has not reserved any power of revocation or variation. That, I think, was its evident object and purpose. It was enacted three years after the other section, and it is made to extend to policies which had been made before as well as to those to be made after it came into force.

Judgment.

MACLENNAN,
J.A.

I therefore think that so far as this policy was settled upon the wife and children by the will, it cannot be made available for the satisfaction of the plaintiff's judgment and is not assets unadministered.

I am, however, of opinion that the policy is not wholly settled upon the wife and children of the testator. The will gives it to the widow during her widowhood, and upon her marrying again gives it to the children. But then it says if she should not marry again she may dispose of it by her will as to her shall seem best. The widow therefore has a clear interest settled upon her, which is indefeasible, that is the income of the money until she marries again. The children have only a contingent interest, that is, the money goes to them if their mother marries again, but not otherwise. If she does not marry again, it goes as she may appoint by will. I think the authorities shew that the widow does not take an absolute interest in the event of her not marrying again. She has at the most merely an estate for life, with a power of appointment by will, and she may appoint to strangers: *Tomlinson v. Dighton*, 1 P. Wms. 149; S. C. 1 Salk. 239; *Thorley v. Thorley*, 10 East 438; *Bradly v. Westcott*, 13 Ves. at p. 453; *Reith v. Seymour*, 4 Russ. 263; *In re Maxwell's Will*, 24 Beav. 246. The will, therefore, has left a contingent interest in this fund which is not settled upon either the wife

interest is, therefore,

If the widow should gain, the money would be subject to the plaintiff's judgment. On her great age without marriage, she would have to wait, or she might be sold. Or she might get nothing.

Interest in the insurance is not within the reach of creditors, the defendant's plea. If that fails, then the plea is dismissed only, then it does not depend upon a discussion of legal and equitable assets or proper conclusion is, that it has not come to the plaintiff. It is a contingency happens it is not available; it does not become an asset until the contingency may happen, and the contingency may happen next month, by the widow's death. If it does, the fund is in the hands of the creditor. It may be that the contingent interest would be subject to the event, but I do not think so. That is determined when it falls into possession.

The defendant is not chargeable with the fund until it comes into his hands, until he receives it, and therefore I think he is not liable with this interest, to draw it out, and that it must be

The learned Judge has authority under the old

practice for what the learned Judge did, and it was held that while a plaintiff could always confess a plea of *plene administravit*, or *plene administravit præter*, and at once take judgment of assets *quando*, yet, if he took issue on the plea and failed, he could not have judgment against future assets: Williams' Law of Executors, 7th ed., p. 1979; *Noell v. Nelson*, 2 Wms. Saund. 226. There seems to be no reason for that rule but the old strictness with which parties were held to their pleadings, which, fortunately, no longer governs our proceedings. Therefore, I think, the learned Judge was wrong in not giving the plaintiff judgment for assets *in futuro*, in order that he might be in a position when and if this contingent interest falls into possession, to make it available for the payment of his debt.

Judgment.

MACLENNAN,
J.A.

I think, therefore, the appeal should be allowed with costs; that the plaintiff should have judgment of assets *quando* for his debt, and the defendant judgment on her plea of *plene administravit*. There should be no costs up to and inclusive of the trial; but the plaintiff should have all usual costs subsequent to the entry of judgment.

Appeal allowed in part with costs.

BRYCE V. LOUTIT ET AL.

Nuisance—Water—Municipal Corporations—Arbitration and Award—Appointment of Arbitrator—Submission—Practice—Appeal—Appeal Book—Costs.

The defendants the corporations of two townships, without being bound to do so, built a culvert under the highway between the townships, to which the other defendant, the owner of lands adjoining one side of the highway, in order to carry off the surface water of his lands, built a drain, and subsequently a "gangway" of stones for the convenience of access to the highway, which had the effect of damming the water on his land. He afterwards made an opening in the "gangway," and the water suddenly rushing through the culvert, flooded the plaintiff's land on the other side of the highway, which was also connected with the culvert by a receiving drain, through which he had theretofore permitted the water in its ordinary course to flow :—

Held, that the defendants the corporations were not, but that the other defendant was, liable for the damage sustained by the plaintiff.

The provisions of a submission to arbitration in reference to the appointment of a third arbitrator must be strictly followed. Where, therefore, a submission provided that the third arbitrator should be appointed by writing endorsed thereon under the hands of the arbitrators therein named and the appointment was not so endorsed, the award was held invalid.

The costs of printing unnecessary material disallowed.

Judgment of GALT, C. J., reversed in part.

Statement.

THIS was an appeal by the plaintiff from the judgment of GALT, C. J.

The plaintiff was the owner of lands adjoining the highway between the townships of Culross and Turnberry, and the defendant was the owner of lands on the opposite side of this highway. The defendant, to carry off the surface water from his land, made a drain leading to the highway, and the corporations built a small culvert under the highway as a passage for the water. The plaintiff allowed the water to be discharged on his land, and built a drain connecting with the culvert, to carry it through his lot. After this had gone on for some time, the defendant built, for convenience of access, what was described as a "gangway," from his land to the travelled portion of the highway, which was about three feet higher than the surrounding land. This had the effect of damming back a considerable quantity of water on his land, and on the untravelled portion of the highway; the over-

flow escaping as before by the culvert into the plaintiff's drain. In April, 1889, the defendant made a small opening in the gangway to let the water off, but the pressure proving too great, the gangway was broken away, and the water rushed through the culvert into the plaintiff's drain, which was too small to carry it off, and much damage was done to his land. Statement.

An agreement for arbitration was entered into, the submission providing that the third arbitrator should be appointed by writing endorsed thereon under the hands of the two arbitrators therein named. No appointment was so made, but a third arbitrator was chosen and an award was made which the plaintiff refused to abide by, and he brought this action, which was referred to a referee for inquiry and report. The referee found in favour of the plaintiff, and assessed the damages at \$223.75, but his report was set aside by GALT, C. J.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., BOYD, C., and OSLER, and MACLENNAN, JJ.A., on the 22nd of November, 1893.

Garrow, Q. C., for the appellant. There is a clear right of action here against the defendant Loutit. He has chosen to dam up on his land the surface water, and that water having escaped owing to his negligence, he is responsible for the resulting damages: *Rylands v. Fletcher*, L. R. 3 H. L. 330. It is no answer to this claim to say that the appellant acquiesced in the water being drained upon his land. Loutit had no legal right to send the surface water upon the appellant's land, and the appellant owed no duty to Loutit to receive it upon his land: *McGillivray v. Millin*, 27 U. C. R. 62; *Crewson v. Grand Trunk R. W. Co.*, 27 U. C. R. 68, and by building a drain to carry off the surface water and to that extent acquiescing in the proceedings of the defendant Loutit the appellant has not debarred himself from complaining of the damage resulting from the breaking of the dam. The right of action against

Argument. the townships is equally clear. They have not only acquiesced in the damming up of the water, and are therefore liable on the same principle as Loutit for the sudden escape of that water, but they have in addition neglected their statutory duty of keeping the highway in repair. The result of the building of the gangway by Loutit has been to close the culvert and allow the waters to accumulate, and had the townships seen that the culvert was kept properly open, the undue accumulation of water could not have taken place. By this non-repair of the highway the plaintiff has been specially injured, and therefore an action lies: *Castor v. Uxbridge*, 39 U. C. R. 113; *Duck v. Toronto*, 5 O. R. 295; *McKelvin v. London*, 22 O. R. 70. It may be said that the statutory obligation to repair exists only in favour of those who use the highway for the purpose of travel, but that is too narrow a construction and apart from the statute there is a common law obligation to repair, and the breach of the duty is sufficient evidence of negligence to support the action. Moreover the pond was a nuisance created by the joint act of all the respondents, and all the respondents are liable: *Thorpe v. Brumfitt*, L. R. 8 Ch. 650; *Humphries v. Cousins*, 2 C. P. D. 239.

Cassels, Q. C., and *P. Holt*, for the respondents the townships. It is impossible to hold the townships liable for the consequences of the acts of the defendant Loutit. They in no way contributed to the injury, and were under no obligation whatever to build or maintain a culvert at the point in question. The highway was kept in proper repair for travel, and the mere fact that water was dammed up at one side of the highway on its untravelled part in no way constituted non-repair of the road. The case is not distinguishable from *Ward v. Caledon*, 19 A. R. 69.

Aylesworth, Q. C., for the respondent Loutit. The injury has, in fact, resulted from the carelessness of the plaintiff himself and from the defective mode of construction of his drain, and had he kept it in proper order and in the same condition in which it had been kept for many years before the injury complained of, no damage would have resulted.

At any rate, the matters in question between the parties have been fully dealt with by the arbitrators to whom the questions have been referred, and the plaintiff is bound by the award. Argument.

Garrow, Q. C., in reply. The third arbitrator was not appointed in accordance with the terms of the submission, and therefore the award is invalid.

February 28th, 1894. OSLER, J. A.:—

The plaintiff, in my opinion, fails to prove anything which can fasten liability upon the defendants, the corporations of Culross and Turnberry. A body of water had accumulated partly on the highway and partly on the land of the defendant Loutit, in consequence of the construction by the latter of the gangway leading from the end of his lane to the highway, which had the effect of stopping up the mouth of the culvert through which the waters, accumulating at that point, had for some time been accustomed to pass gradually away. But it was not proved either that the corporations had authorized the construction of the gangway or had taken any part in letting loose the waters which had been confined by it. So far as those waters obstructed the highway or rendered it out of repair, the defendants, the corporations, might have been responsible to any one affected thereby. But the act of letting off the water was that of the defendant Loutit alone, and it was this and this only which caused the damage complained of. The case of *Ward v. Caledon*, 19 A. R. 69, is not distinguishable from the present case in this respect; and on the principles there laid down, I am of opinion that the townships are not responsible. They were not bound to have or to maintain a culvert at the point in question to let the waters pass across the road into the plaintiff's drain, any more than the plaintiff was bound to receive such waters in that manner. And if, in consequence of the act of the defendant Loutit in stopping up the culvert, the waters gathered on his land and on

Judgment.

OSLER,
J. A.

the highway, a thing in itself not injurious to the plaintiff, on what principle can the defendant corporations be held responsible for his equally unauthorized act, in removing the obstruction, and thus suddenly discharging the waters into the culvert and so into the plaintiff's drains in a manner for which they were not constructed, and in quantities beyond their capacity to safely receive? As to these defendants, I think the judgment of the learned Chief Justice must be affirmed and the appeal dismissed.

The case of the defendant Loutit stands in a different position. The plaintiff had for many years permitted the townships to discharge, by means of the culvert, the surface water which reached that point from the defendant's land and the road into his land through the drain which he had constructed to receive it. He was not obliged to submit to the water being thus gathered to a point and discharged upon his land through this culvert, but he did so submit, and therefore, to the extent and in the manner in which, previous to the act of the defendant Loutit, they had been in the habit of discharging themselves through the culvert, and into his, the plaintiff's, drain, he could not complain; and his drain would appear to have been sufficient to carry away the water so coming upon him. Loutit, however, for his own purposes, and to give himself a more convenient access to the road from his lane, which came out upon the road opposite the end of the culvert, constructed what has been called a gangway, of stones, leading from the end of his lane across the highway up to the end of the culvert, the effect of which was, in course of time, to block up the culvert and prevent the surface water from passing through it as it had formerly done. The result, of course, was that at certain seasons it formed a pond of considerable size on the side of the road and extending back upon the defendant's land.

On the 20th April, 1889, the defendant removed some of the stones from his gangway for the purpose, as it would seem, of letting off the water which had thus accumulated, and the whole, or nearly the whole of it, was

in a very short time discharged in some way, through the culvert or otherwise, upon the plaintiff's land, entering his drains and bursting them and doing considerable damage. The proper inference, I think, is, even if the report of the referee is not very clear upon that point, that they were discharged through the culvert; but that is not material if in fact they were set free by the defendant and discharged in a body upon the plaintiff's land. The plaintiff's drains were not constructed to receive or to withstand the pressure of a large body of water suddenly entering them, nor was he bound to receive water sent down upon him in such a manner: *McGillivray v. Millin*, 27 U. C. R. 62; *Crewson v. Grand Trunk R. W. Co.*, 27 U. C. R. 68. It was this which caused the injury he complains of, and if the facts were as I have stated, his cause of action against the defendant Loutit is abundantly clear. See *Baird v. Williamson*, 15 C. B. N. S. 376; *West Cumberland Iron and Steel Co. v. Kenyon*, 11 Ch. D. 782, 789; *Fletcher v. Rylands*, 3 H. & C. at p. 789, *per* Bramwell, B.

The case is one in which the findings of the referee who heard the witnesses, and saw the premises, ought to be adhered to if there is any reasonable evidence to support them. That there is such evidence, I am, after a careful perusal of the appeal book, quite satisfied. The case for the defendant is that there really was no overflow or resulting damage at all, or if there was, that it was the fault of the plaintiff's drains, that they could not carry it away. On the first point there is certainly an extraordinary discrepancy in the evidence, to some extent, perhaps, accounted for by the fact that most of the defendant's witnesses did not see the premises until some time after the event. As to the second, I have already said that the defendant cannot assert a duty or servitude on the plaintiff's part to provide for or receive surface waters discharged upon him in the manner found by the referee. The judgment of the Court below seems to proceed upon the latter ground and with all respect I am

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

obliged to think it erroneous: *Nield v. London & North Western R. W. Co.*, L. R. 10 Exch. at p. 7.

The only other point which seems to require notice is the defence that the matters in question in the action have been dealt with, and disposed of, by an award between the parties. The referee has held, and I agree with him, that the award is invalid, on the ground that the third arbitrator was not appointed as required by the submission, viz., by writing endorsed thereon, under the hands of the two arbitrators named therein. Had it been shewn that the parties had proceeded with the arbitration knowing that there had been no valid appointment of a third arbitrator, we might have had to consider how far the award could be supported, as having been made upon a parol submission, but nothing of that kind appears. No authority has been cited, or found, which supports the award against the objection opposed to it. See *Still v. Halford*, 4 Camp. 17; *Oliver v. Collings*, 11 East 367; Russell's Law of Arbitration, 7th ed., pp. 214, 234.

As respects the defendant Loutit, the appeal must be allowed and with the usual result as to costs. The appeal book, however, invites the attention of the taxing officer, as it appears to me to contain much unnecessary matter. The submission and award are twice printed at length, and there is much so-called evidence which might, with ordinary care, in settling the book, have been judiciously omitted. On the whole, we think it may save the parties some expense, and the taxing officer some trouble, if we direct that one-third of the appeal book shall be disallowed on the taxation, which will include as well what should not have appeared in the appeal book at all, as so much of it as relates to the case against the two corporation defendants as against whom the appeal is dismissed.

MACLENNAN, J. A. :—

I am of opinion that this appeal should be allowed as against the respondent Loutit, and that it should be dismissed as against the defendants the townships.

There was no natural watercourse at the place where the culvert was made, and therefore the plaintiff was not obliged to allow the water which accumulated either on the highway or on the defendant's land to flow upon his land, or to pass through his drains: *McGillivray v. Millin*, 27 U. C. R. 62; *Crewson v. Grand Trunk R. W. Co.*, 27 U. C. R. 68; *Darby v. Crowland*, 38 U. C. R. 338; and if either the municipalities or the defendant Loutit desired to obtain the privilege of draining through the plaintiff's land they could not do so without taking the steps prescribed by law for that purpose. Unless they did so he could bank up his land so as to prevent any water flowing upon it either from the road, or from the land on the opposite side.

Judgment.
MAOLENNAN,
 J.A.

It seems that some twelve or fourteen years before the trial, and a year or two after the culvert had been renewed, the plaintiff had made a connection between a drain on his land, and the road ditch, whereby the water which came across the road through the culvert could and did pass into his drains. As long as he left that connection open he could not complain of the water which thereby reached his land, even if by a sudden flood from rain or melted snow it came in such a quantity and with such violence as to do him damage. It was his own voluntary act to make the connection, and he could not blame any one else for the consequences. But the plaintiff was not obliged to continue the connection, and he could stop it up at his pleasure.

I am, with great respect, unable to agree with the judgment of the learned Chief Justice on this part of the case.

As I have already said, if the water had been allowed to pass away through the culvert gradually and without obstruction, the plaintiff could not have complained of a flood arising from a heavy rain or sudden thaw, for he had himself made a connection between his drain and the road ditch, and thereby invited the flow of the water. But all he did was to invite it in its ordinary and natural flow; and he by no means invited or authorized the sudden opening of the dam, which the defendant Loutit had

Judgment. made, and the down pour of water which ensued. If there
MACLENNAN, had been here a natural watercourse, Loutit could have
J.A. dammed it up on his own ground or on the road side, for any purpose of his own. But if he allowed it to escape suddenly and in great volume to the injury of riparian proprietors lower down, numerous cases decide that he would be liable for the damage. That has been decided so often that it is elementary law. The principle must be the same here. Grant that the plaintiff permitted or invited the water to pass over his land in its ordinary natural flow, he was not bound to have his drains or his land in any particular state except to meet and receive that natural flow. He owed no duty to the defendant in respect of his land or his drains. If it be true that his drain was entirely stopped up and useless, as the learned Chief Justice thinks the evidence shews it was, that does not excuse the defendant. The plaintiff could stop his drain up altogether if he chose, and could refuse to receive the water altogether. But the referee finds, and I think the evidence warrants the finding, that the plaintiff's drains were sufficient for the ordinary natural flow of the water, if it had not been dammed up by the defendant, even though not sufficient for the case of a flood.

I, therefore, think the plaintiff entitled to recover the damages found by the referee against the defendant Loutit, and that to that extent the appeal should be allowed.

I am, however, of opinion that the judgment is clearly right in dismissing the action against the two townships. As to them, I think the action was entirely misconceived. It is said that the closing of the culvert so that the water became dammed up in the pond and dangerous, was disrepair, which conduced to the plaintiff's damage.

I think the disrepair for which a municipality is liable is disrepair of a highway. The duty to repair is to persons using or desiring to use the road as such, that is to use it for travel; as long as it is in good order for travel it is in repair. The pond on the defendant's ground did

no harm to the road. If left alone it would have dried up and disappeared by evaporation, as it had done in previous years. It is not suggested that there was any danger of its breaking away of its own force, if that would have made any difference. The townships had nothing to do with opening it and allowing the water to escape. That was the act of the defendant Loutit alone, and he alone is responsible for it. It was he who made the dam in the first instance, and he who opened it on the 20th of April, and it is he alone who ought to make good the damage.

Judgment.
MACLENNAN,
J. A.

I, therefore, am clearly of opinion that the action was properly dismissed as against the townships, and that as to them the appeal fails.

HAGARTY, C. J. O., and BOYD, C., concurred.

Appeal allowed in part with costs.

KENNY V. CALDWELL.

Evidence—Survey—Plan—Description.

The description of a lot prepared for and used by the Crown Lands Department in framing the patent, which grants the lot by number or letter only, is admissible evidence to explain the metes and bounds of that lot.

The plan of survey of record in and adopted by the Crown Lands Department governs on a question of location of a road, when the surveyor's field notes do not conflict with the plan and no road has been laid out on the ground.

Judgment of the Common Pleas Division reversed.

Statement.

THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division.

The question was one of boundary. Both parties claimed under the same patent, the contest being as to the point of commencement of the description of the plaintiff's land, the plaintiff contending that there was a road allowance to the south of the lot as patented, and that his parcel commenced at the northerly boundary of this road, and not at the northerly boundary of the next lot, which was an ascertained line.

The action was tried on the 8th of October, 1891, at Barrie, before FERGUSON, J., who found in favour of the defendant, and his judgment was affirmed by the Common Pleas Division, the Judges being divided in opinion. A good deal of evidence, which it is unnecessary to refer to in detail, was given as to the work on the ground, one very old man, named Johnson, describing the position of some of the surveyor's posts in the locality in question.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., and ROBERTSON, J., on the 30th of November, and 1st of December, 1893.

McCarthy, Q. C., and Pepler, Q. C., for the appellant.
Lount, Q. C., and C. E. Hewson, for the respondent.

Two points of law were discussed, viz., the admissibility **Statement.** in evidence of descriptions for patents, prepared for and used by the Crown Lands Department; and the weight to be given to the plan of survey. The cases cited on these points are referred to in the judgments.

February 28th, 1894. OSLER, J. A. :—

[The learned Judge stated the facts and analyzed the evidence, coming to the conclusion that the field notes and evidence as to work on the ground, left it quite uncertain whether or not the road had been laid out; and then continued :]

That the plan or diagram of survey, and the description for grant, were admissible as evidence, to prove the existence of the road in question, appears to me incontrovertible. The former is the official plan and record of the survey from which the grants of the lands surveyed and plotted out thereon, have been made. In *Badgely v. Bender*, 3 O. S. 221, Sir John Robinson, in speaking of such a plan where no evidence remained or could be given of an actual original survey, said (p. 226): “ When we know that it is on these official documents that the patents have been subsequently framed, we must be convinced of the extreme danger of trusting so implicitly to anything else as to these official diagrams, for information upon the plan on which the several townships were laid out. This has not been questioned in our courts at any time within my knowledge.” There is much in that case to justify us in holding—if the case had to turn upon that point—that as against the evidence afforded by a plan and descriptions for grant, and the inference to be drawn from the instructions to the surveyor, and the principle on which the survey was performed, it would be unsafe at this distance of time to accept and act upon the recollection of Johnson, as to the position of the post he speaks of, which he might very easily have confused with the stake which was planted twenty-two feet distant, at the north-west corner of lot 10.

Judgment.

OSLER,
J.A.

In *Regina v. Great Western R. W. Co.*, 21 U. C. R. 555, at p. 577, the Court, speaking by the same Chief Justice, say: "Under the 313th clause of the Municipal Act (the origin of which is section 12 of 50 Geo. III. ch. 1), the fact of a government surveyor laying out certain allowances for road in the plan of the original survey of Crown lands would be sufficient, we think, to give to such roads or streets the legal character of highways, though there may have been no stakes planted on the ground to mark them out." See also, *Regina v. Hunt*, 16 C. P. 145; and in Appeal, 17 C. P. 443; and *Carrick v. Johnston*, 26 U. C. R. 69, where it is said the work on the ground must govern; but under section 313, the fact of the government surveyor having laid out the road on his plan of the original survey would make it a highway, unless there was evidence of his work on the ground clearly inconsistent with such plan.

So in *Hagarty v. Britton*, 30 U. C. R. 321, it was held that it was competent for the original Crown surveyor in laying out the plan or diagram of the survey, to make an allowance for a road not inconsistent with his work on the ground. In the same case it was also held that the descriptions for grant by metes and bounds in the Crown Lands Department were admissible to explain the patent for the lot when it had been described only by the number of the lot and concession. See also *Martin v. Crow*, 22 U. C. R. 485; *McGregor v. McMichael*, 41 U. C. R. 128; *McEachern v. Somerville*, 37 U. C. R. 609, 620, 629.

The plan and the description for grant of 10 and D, shew the road in question; the land has been granted in reference to the plan, and there being no work on the ground inconsistent therewith, I am of opinion that the existence of the road is well proved, and that the appeal should be allowed.

MACLENNAN, J. A. :—

There are two questions in this appeal: first, whether the plaintiff has established a paper title to the land in dispute; and, secondly, whether or not he has made good

a title by length of possession. If he has a paper title, it becomes unnecessary to consider the second question, for in that case the plaintiff is entitled to succeed.

Judgment.

MACLENNAN,
J.A.

The plaintiff's title deed conveys to him 100 acres, more or less, composed of the south east part of lot lettered D, on the east side of the Penetanguishene road, in the township of Oro, being a block having a frontage of 80 rods on the eastern boundary, and of 200 rods on the southern boundary thereof. His title is derived regularly by a number of mesne conveyances from the patentee of the Crown, one Catharine McDonald, to whom the whole lot D was granted on the 2nd May, 1839, under the great seal of Upper Canada. The patent describes the grantee as the only child and heiress-at-law of John McDonald deceased, who was the assignee of the Hon. William McGillivray deceased; and it includes, not only lot D, but lots 4 and 10 in the same concession. There is no description by metes and bounds or otherwise in the grant, but the three lots are just described by name, thus: "That parcel or tract of land situate in the township of Oro, * * containing by admeasurement 600 acres, be the same more or less, being composed of lots numbers 4 and 10, and lot lettered D, on the east side of the Penetanguishene road in the said township of Oro."

The question in dispute between the parties is, whether lot lettered D had at the date of the patent an allowance for road for its southern boundary. If it had, then the plaintiff's paper title covers the land in dispute, otherwise not; the reason being that in the latter case his twenty chains of frontage would begin one chain further south, and would not reach the disputed land.

The patent not containing any description whatever of lot D, except that it lies east of the Penetanguishene road in the township of Oro, the plaintiff was obliged, in order to make out his case, to resort to extrinsic evidence for the purpose of shewing the southern limit of lot D on the ground, from which the twenty chains in his deed ought to be measured.

Surveyor Wilmot's field notes
him between the 29th of
1811, also his instructions
some correspondence be-
subject of the survey. He
Wilmot's plan, and of
Crown Lands Department
they related to the land
the descriptions for patent
two lots 4 and 10 which
to Catharine McDonald
sides of the work on the

his evidence established a
boundary of lot D, but in-
volved the case, decided that
the ground were plainly
though Wilmot's plan shewed
notes and the work on the
plan, there being no refer-
the learned Judge rejected
as inadmissible evidence.

Court affirmed the decision
Chief Justice being for
brother Ross for rever-

examined the evidence, coming
notes and work on the
with the conclusion that
of lot D, and continued)
completed by the 31st of
in January following, and
surveyor in his office and
part of his survey is not pro-
it would have cleared up
must be regarded as a part
part, of his report, and
the field notes, and when

not in conflict with the work on the ground, must be regarded as conclusive.

Judgment.

MACLENNAN,
J.A.

In *Badgely v. Bender*, 3 O. S. 221, it was held by the majority of the Court, in an elaborate judgment of the late Chief Justice Sir John Robinson, that a copy of the official plan of a township, shewing thereon an allowance for a road crossing a certain lot, was, without more, and in the absence of anything to the contrary, good evidence of the allowance. I quote the following passage from his judgment, (pp. 225 and 226): "That the evidence was legal evidence, has not, I think, been seriously questioned. It is probably forty years or more since this township was laid out. It is but seldom now that recourse can be had to the *viva voce* evidence of the individuals who actually made the original survey of these early settled townships. More than a generation has gone by; some few of them may yet be left, but a few years will place their evidence out of reach; and even where it may yet be had, their verbal account from memory of what they did forty years ago, would be in truth a much less safe and satisfactory description of evidence than the official return of their survey, delineated on paper at the time; and besides when we know that it is on these official documents that the patents have been subsequently framed, we must be convinced of the extreme danger of trusting so implicitly to anything else, as to those official diagrams for information upon the plan on which the several townships were laid out. This has not been questioned in our courts at any time within my knowledge. I mean the court has never hesitated to receive the original plans called the Quebec plans (in reference to these old surveys made before the division of the Province), as evidence of the manner in which the respective townships have been subdivided; with respect to the numbers of lots, allowances for roads, and in short the general scheme of the survey, it is an established practice to admit them; and I conceive it to be undeniably warranted by the principles of evidence according to the law of England." And Sir James Macaulay, who differed

Judgment. from the other members of the Court on the merits, said on
MACLENNAN, the same subject (p. 232): "The patent does not point out
J.A. or designate the course or extent of such allowance, and it becomes necessary to resort to extrinsic aid to discover it. The best proof is the allowance made on the ground in the original survey. If that cannot be established, the public records may be looked to; but they, unless proved by the actual survey originally made to be inaccurate, should not be deviated from unless upon some clear and unequivocal ground. Lands are frequently, if not always, described by the plans, which are supposed to accompany the report of, or to be compiled from, the original survey."

This case was decided sixty years ago, and so far as I can discover, has never been questioned since. The remarks of Sir John Robinson were made with reference to a survey then forty years old. The present survey and plan are upwards of eighty years old, and the plan has the allowance in question distinctly delineated upon it. I think it would be extremely dangerous to hold, on the very uncertain testimony of a witness of great age, no matter how respectable, speaking of what he had seen casually upwards of sixty years before, that the plan was wrong on a matter as to which all other contemporary writing is silent.

I therefore think, that even if the evidence of Johnson could be regarded as inconsistent with an allowance for road between 10 and the gore, credit ought to be given to the plan rather than to such evidence.

But the surveyor's plan was not the only piece of evidence. There is no lot lettered D mentioned in the field notes or on the surveyor's plan either. Such a lot is found only on the office plan of the township in which the south half of the gore north of 10 is so designated. When, therefore, we wish to find lot D east of the Penetanguishene road in the township of Oro, we cannot find it in the original survey, or in the field notes or in the surveyor's plan. We must look elsewhere for it, and we find it in the office plan of the township; and we also find an allowance for road between it and lot 10.

If we concede, therefore, that the surveyor laid out lots 10 and 11, and a road allowance alongside of 11, he left the gore alone and unsurveyed. Afterwards the Crown had a plan of the township prepared, and upon this plan the gore is subdivided into three parts, namely, lots D and E, and an allowance for road along the southern limit of D. *Badgely v. Bender*, decides that this plan alone without any evidence by whom compiled, or from what materials, is sufficient evidence of the allowance.

Judgment.
MACLENNAN,
J.A.

But besides the surveyor's plan and the office plan, there were the descriptions for patent, which the learned Judge rejected.

These documents are official records. They are instruments signed by an official of the Surveyor-General's department, and were evidently prepared for the guidance of the proper officer in, and as his authority for, the preparation of the patents, and I think my learned brother was wrong in rejecting them as evidence.

The language of Macaulay, C. J., above quoted, shews that it was his opinion that where the patent was silent, the public records might be resorted to for explanation; and the reasoning of Sir John Robinson is as applicable to any other record as to a plan, for he held the plan evidence without any proof by whom compiled or with what materials.

In *Regina v. Great Western R. W. Co.*, 21 U. C. R. 555, at p. 577, the same learned Judge, delivering the judgment of the Court, held that the fact of a government surveyor laying out certain allowances for roads on the plan of the original survey of Crown lands would be sufficient to give such roads the legal character of highways, though there might have been no stakes planted in the ground to mark them out, and that they would be deemed highways in law before they were actually opened and used. This decision was upon section 313 of the Municipal Act, C. S. U. C. ch. 54, which is the same as the Act 50 Geo. III. ch. 1, sec. 12, which was in force when Wilmot made the survey in question.

Judgment. In *Regina v. Hart*, 16 C. P. 145, Sir Adam Wilson
MACLENNAN, reviewed all the authorities and held that it was sufficient
J.A. to lay out a road on the plan without any work on the ground.

Hagarty v. Britton, 30 U. C. R. 321, in which the judgment of the Court was delivered by the late Sir W. B. Richards, C. J., is an authority, not only in favour of the surveyor's and the office plans being admitted to explain a patent, but also of the description for patent. In that case the defendant offered in evidence the extended description of a broken lot as prepared in the Surveyor-General's office, but which was not incorporated in the deed. The reception of this document as evidence of the description of the land was objected to. In delivering judgment, the learned Chief Justice says, (p. 336): "We see no reason why the plan on which these grants are made, may not be referred to, to aid in interpreting the grant, and as shewing what the Government intended should be the boundaries of the land they were granting. The plaintiff's counsel objected to the full description of No. 10 being given in evidence as shewing what the Crown intended to grant by the patent. We see no objection to that evidence. It is well known that the lots that are described in the patent by these numbers and concessions are granted from the plans and surveys supposed to be made; and these documents being of a public nature may be always referred to as shewing the basis on which the grant was made."

In *Stevens v. Buck*, 43 U. C. R. 1, Harrison, C. J., reviewed the authorities, and held that the Department of Crown Lands might alter the office plan of a township, and that patents afterwards granted would be governed in their construction by the altered plan.

I am of opinion, therefore, that these descriptions for patent are admissible in evidence, and that they are conclusive.

The appeal should, therefore, be allowed, and there should be judgment for the plaintiff in the action, and on the counter-claim.

Judgment:

HAGARTY, C. J. O. :—

HAGARTY,
C.J.O.

I agree. I think that the plan must govern whether the road was laid out with or without instructions. The Crown could adopt the plan and lay out the tract of country as it pleased.

ROBERTSON, J. :—

I agree.

Appeal allowed with costs.

HANLEY V. THE CANADIAN PACKING COMPANY.

Sale of Goods—Quantity—Description—"Car-load"—Contract—Performance—Option.

The defendants agreed to buy from the plaintiff a car load of hogs at a rate per pound, live weight. The plaintiff shipped a "double-decked" car load, and the defendants refused to accept this, contending that a "single-decked" car load should have been shipped. There was conflicting evidence as to the meaning given in the trade to the term "car load of hogs," and it was shewn that hogs were shipped sometimes in the one way and sometimes in the other :—

Held, [HAGARTY, C.J.O., dissenting], that the plaintiff had the option of loading the car in any way in which a car might be ordinarily or usually loaded, and that he having elected to ship a double-decked car load, the defendants were bound to accept.

Judgment of the County Court of Middlesex reversed.

THIS was an appeal by the plaintiff from the judgment Statement.
of the County Court of Middlesex.

The plaintiff was a dealer in live stock, carrying on business in the township of Brant, and the defendants were a pork packing company, carrying on business at the city of London. On the 2nd of August, 1893, the plaintiff, who had had previous dealings with the defendants, telegraphed to them as follows: "Name best price car hogs this week or next." To this the defendants replied quoting a price per pound, live weight, for hogs, and after some further telegrams had passed between the parties settling the price and date of delivery, the plaintiff tele-

Statement. graphed: "Will bring load Saturday morning." On the 12th of August, 1893, the date fixed by this telegram, the plaintiff tendered to the defendants at London a car of hogs containing 158 animals, the car being what was known as a "double-decked" car. Between the 5th of August and the date of delivery the price of hogs had fallen one cent per pound, live weight, and the defendants refused to accept the car loaded in this way, contending that they had only intended to buy, and were only bound to accept, a "single-decked" car load. By arrangement between the parties the defendants paid to the plaintiff the contract price for the number of animals required to fill a single-decked car and the then current market price for the remaining animals, and the plaintiff thereupon brought this action against them to recover the sum of \$146.90, the balance due for the double-decked car load at the contract price.

The action was tried before His Honour Judge William Elliot, at London, in October, 1893, when conflicting evidence was given as to the meaning that would be given in the trade to the words "car hogs," and it was shewn that hogs were sometimes shipped in one way and sometimes in the other.

The learned Judge having dismissed the action, the plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., on the 9th of January, 1894.

I. F. Hellmuth, and *W. C. Fitzgerald*, for the appellant. The learned Judge has held that the onus was on the plaintiff to shew that the double-decked car load of hogs shipped by him came within the words of the contract, but, on the contrary, it is for the defendants to shew that what was tendered to them was something that could not come within the term. There was no necessity for shewing that there was a settled custom or usage by which the term "car" would be interpreted "double-decked car." The term being ambiguous, the plaintiff was

entitled to place upon it any interpretation that might reasonably be placed upon it, and the defendants were bound to carry out the contract with that interpretation. Argument.

Hume Elliot, for the respondents. The interpretation to be given to this term is a question of fact. The evidence is conflicting, but the fair inference is that when a double-decked car is wanted that term is used, while "car" means a car loaded in the ordinary way, without any extra accommodation.

I. F. Hellmuth, in reply.

February 28th, 1894. OSLER, J. A.:—

Contrary to my impression at the argument, I am of opinion, on further consideration, that the plaintiff is entitled to succeed.

The defendants agreed to buy a car load of hogs, to be paid for at so much a pound live weight, and the plaintiff has delivered them a car load of hogs. But they say: "We meant a car load of hogs packed or shipped in a particular way, namely, in a single-decked car, by which we would have received and become liable for a smaller quantity than the car load which the plaintiff has shipped to us in a double-decked car." This, I think, is a defence which, under the circumstances, is not open to them. There was no evidence of any established usage or custom in the trade which would annex to the contract the term that a car load was such as would be comprised in a single-deck car, nor was there evidence of any previous dealing or usage between the parties themselves which would explain their contract to have been made in reference to a particular kind of car load. The defendants agreed for a car load *simpliciter*, knowing that a car might be properly loaded in either way, and they got what they ordered. It is not open to them to say that they meant a car loaded in a different way from that which the plaintiff sent them, for that would be to vary the written contract that has been made between them, which was for a car load, and must be regarded as giving the plaintiff the option to load the car in any way in which such a car might be ordinarily or

Judgment. hogs meant "an ordinary car laden with hogs;" that is
MACLENNAN, to say a single-deck car, and he dismissed the plaintiff's
J.A. action.

The evidence established that there are two kinds of cars for loading hogs in use by railway companies, called single-deck and double-deck cars respectively; the former kind having only one floor or deck, and the latter two floors, one over the other, for the support of the animals.

Both kinds are in common use, the latter at least quite as much as the former, and the use of both kinds was perfectly well known to the plaintiff and the defendants at the date of the contract.

Under these circumstances, with great respect to the learned Judge, I think it cannot be said that a car of hogs *prima facie* means either the one kind or the other; either kind of car, when loaded, is a car of hogs. It is quite evident that either kind of car when loaded, whether seen standing at a station, or proceeding along the line, would be called, and properly called, a car of hogs. That is the plain common meaning of the words, and in my opinion what the plaintiff offered to the defendants at London on the day appointed answered the description of the very thing which he had agreed to sell, and which the defendants had agreed to buy. Suppose that the case had been this: The plaintiff had a double-deck load standing at the station at Brantford, and telegraphed to the defendants, saying: "I have car hogs at station here, will you buy and what price?" and the defendant answered, "Yes," and naming price; and that was agreed to by the plaintiff. Is it not clear that it would be a good contract for the sale of the double-deck load? It would be a sale of specific goods, and I cannot doubt that the words "car hogs," would be a sufficient description of that, having regard to the evidence given in this case. If so, I do not see what difference it makes that the goods in this case were not specific. The question in each case is, whether what the plaintiff offered did or did not answer the description of the goods which he agreed to sell. I think what he delivered was, accord-

ing to the strict plain common meaning of the words themselves, a car of hogs.

Judgment.

MACLENNAN,
J.A.

I think we are bound to interpret the words in question in their plain ordinary sense, according to the rule often quoted, laid down by Tindal, C. J., in the House of Lords, in *Shore v. Wilson*, 9 Cl. & F. 355, at p. 565. He there says: "The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the application of those words to * * the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible." He then points out that where difficulty arises as to the application of the words used under the surrounding circumstances, the sense and meaning may be ascertained by evidence *dehors* the instrument, but that "in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, * * any more than by express parol declarations made by the party himself, which are universally excluded."

I think, therefore, that we cannot here regard any evidence of the sense in which the words in question in this case were used by either of the parties. The words have a plain, well understood meaning, and we must make the best of them. A car of hogs is just a car of hogs, whether it be a double-deck or a single-deck. The one is as much a car of hogs as the other.

The only remaining question is, whether there being these two different ways of loading, there is such uncertainty in the contract as avoids it altogether. I think there is no such uncertainty. There is always an element of uncertainty where the subject of the contract is not a specific article; and the rule is, *id certum est quod certum est*. There is no

Judgment. more uncertainty here than in an agreement to buy from one hundred to two hundred hogs at such a price per pound, or for a lease for three, six, or nine months, at such a rent per month ; or for a sale of from twenty to thirty acres of such a piece of land, at so much per acre, all of which would be perfectly good contracts. Here the contract is for a car of hogs, which may be either a single-deck or a double-deck load, at so much per pound ; and the evidence shews about how many animals that means in the one case and the other. Even if single-deck or double-deck had been specified, there would still be uncertainty in the number and weight of the animals within certain limits. In such case there is a right of election with one or other of the parties ; and the rule is stated by Lord Blackburn to be, " That when from the nature of an agreement an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of the agreement ; when once he has performed the act the choice has been made and the election irrevocably determined ; till then he may change his mind as to what the choice shall be, for the agreement gives him till that time to make his choice : " Blackburn's Contract of Sale, 2nd ed., p. 130 ; citing *Heyward's Case*, 2 Co. 36 ; and see *Reed v. Kilburn Co-operative Society*, L. R. 10 Q. B. 264.

In the present case the plaintiff was to do the first act. The contract required him to deliver the goods at London on a certain day, and the right of election was, therefore, with him to deliver either a single-deck or a double-deck load. If the price agreed upon had been for a lump sum, then by comparing that price with the market value of the goods at the time it might have been apparent that the parties both intended one kind of a load, and not the other ; but as the price agreed upon was so much per pound, it throws no light whatever on the question, and leaves to the plaintiff the option of determining which kind of a load he was to deliver.

I am, therefore, of opinion that the judgment is wrong and should be reversed, and that our judgment should be for the plaintiff.

Judgment.
MACLENNAN,
J.A.

HAGARTY, C. J. O.:—

It seems impossible to me to decide this case as a mere question of law, settling the legal meaning of the words used by the parties to the contract. If there had been a jury the Judge could not have withdrawn it from them, and decided it as a legal question.

The evidence called by the parties as to how such an expression would be used and understood in the trade of buying and selling of hogs, the ordinary usage of railway cars for the carriage of hogs and sheep, all must be heard and discussed as leading to what seems to me to be the final point for decision, viz., How would such words as these be used and understood by persons conversant with the practice and usages of the particular trade or business? In other words, How would the plaintiff receiving such a written order reasonably understand what was ordered?

He would be bound to understand the language as used in the trade or in the transmission of such goods by rail.

As already noticed, I do not think the Judge could have told the jury as a matter of law what the words meant. This would have to be decided as the result of the conflicting evidence adduced to prove a usage or practice, and the jury would have to find it as a question of fact properly submitted to them.

Here we have no jury, the Judge has to decide both fact and law.

In his view the plaintiff was not warranted in reading the defendants' order as he did, and sent the larger quantity at his peril.

We have now to put ourselves in his place.

I hardly agree with some of the learned Judge's reasoning or his view as to the necessary *prima facie* meaning of the order.

Judgment.

HAGARTY,
C.J.O.

But I am not prepared to hold that his ultimate decision against the plaintiff is wrong on the evidence, so that we could properly overrule him.

On the whole case, if properly left to me as a juror, I think I would have found for the defendants.

If no hogs had been delivered, and the market had risen, and the vendees had sued, could they have insisted on a two-decked car load, the plaintiff here (then defendant) insisting that one single car load only was contracted for? That would have raised the same question in a different aspect.

I do not think the Judge could possibly rule as mere matter of law that he was bound to send the double load.

It would have, as here, to depend on the evidence of usage and understanding.

Appeal allowed with costs,
HAGARTY, C. J. O., *dissenting.*

THE MUSKOKA MILL AND LUMBER COMPANY

V:

McDERMOTT ET AL.

Timber—License—Trespass—Crown Lands Department—R. S. O. ch. 28.

The legal right of a licensee of timber limits under a license issued by the Ontario Crown Lands Department ceases (except as to the matters specially excepted by the Act) at the expiration of the license year, and there is no equitable right of renewal capable of being enforced against the Crown or sufficient to uphold a right of action for trespass committed after the expiration of the license and before the issue of a renewal.

The insertion in a license, after its expiration, of a lot omitted by error does not confer upon the licensee such a title as enables him to maintain an action for trespass committed on the omitted lot.

Judgment of the District Court of Muskoka reversed.

THIS was an appeal by the defendants from the judgment of the District Court of Muskoka. Statement

The plaintiffs brought this action, in the County Court of York, to recover the sum of \$200, the value of timber cut by the defendants upon island "N" in Lake Joseph, while, as alleged, held by the plaintiffs under license issued by the Ontario Government. Subsequently, at the instance of the defendants, the venue was changed to the town of Bracebridge, and the action was transferred to the District Court of Muskoka. It came on for trial at Bracebridge, on the 20th of June, 1893, before His Honour Judge Mahaffy, who, on the 21st of October, 1893, gave judgment in favour of the plaintiffs for \$180 and costs.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., OSLER, and MACLENNAN, JJ.A., on the 10th of January, 1894.

It appeared at the trial that the island in question was included in a timber license granted to the plaintiffs bearing date the 17th of June, 1878, and terminating on the 30th of April, 1879, and also in licenses issued every year thereafter up to and inclusive of the year 1882-3, the license for which terminated on the 30th of April, 1883. In the

Statement. following year another license was issued bearing date the 22nd of June, 1883, terminating on the 30th of April, 1884, which covered only islands "A" to "M" inclusive. This was the first and only license in which island "M" appeared.

Licenses were afterwards issued yearly, seven in all, the last of which was dated the 1st of May, 1891, and terminated on the 30th of April, 1892, in each of which appeared the series of islands from "A" to "L," in Lake Joseph, inclusive, island "N" never having been granted after the license terminating on the 30th of April, 1883, but ground rent to same amount was paid to the Crown after the omission of island "N."

That island was granted by the Crown to one Campbell, on the 24th of September, 1884, and was subsequently bought by the defendant Bryce on the 26th of August, 1889. The trespasses complained of were committed in the months of July and August of that year. After the timber had been carried away, converted into lumber and sold, the plaintiffs made a claim upon the defendants for it, but finding that the island was not included in their timber license, they procured an officer in the Crown Lands Department, who described himself as the chief clerk of the Woods and Forest Branch of the Department, to insert island "N" in the last four licenses, the first commencing on the 19th of May, 1888, ending on the 30th of April, 1889, and the last commencing on the 1st of May, 1891, and ending on the 30th of April, 1892. This was done on the 1st of February, 1892. The clerk said that island "M" had been inserted by a clerical error, and that there was no reason for dropping island "N;" that the view taken by the Department was that the latter had been omitted by mistake, and that when the mistake was discovered it was corrected by an interlineation. He said he had authority to restore the island to the expired licenses in this way. Whether such authority was directly derived from his superiors for the particular occasion, or was considered incident to his office, did not appear. The patent from

the Crown contained an express reservation of the pine timber under the provisions of section 12 of the Mining Act, R. S. O. ch. 31. Statement.

Moss, Q. C., for the appellants. This case is not distinguishable from *McArthur v. Northern and Pacific Junction R. W. Co.*, 17 A. R. 86, for at the time the alleged trespass was committed no license was in force, and there was no equitable right of renewal in the plaintiffs sufficient to enable them to maintain the action. The subsequent amendment of the license can at most avail only from the date at which the amendment was made: *Oshey v. Hicks*, Cro. Jac. 263. Moreover, the plaintiffs have mistaken their forum as the title to timber is in question and the jurisdiction of the District Court is ousted: *McNeill v. Haines*, 17 O. R. 479.

R. S. Cassels, for the respondents. It is clearly shewn that the omission of island "N" from the license was a mere clerical error, and this error having been corrected before action, the license should be read as if the island had always been included therein. Even if the omission is more than a clerical error, the plaintiffs have sufficient title to maintain the action, for the amendment relates back to the date of the license: *Gilmour v. Buck*, 24 C. P. 187. *McArthur v. Northern and Pacific Junction R. W. Co.*, is distinguishable, for there the trespass was committed at a time not only prior to the issue of the license but prior to the period that the license when issued purported to cover. The plaintiffs here, have, by payment of rent and holding possession of the lands, shewn sufficient title apart from the license to enable them to maintain an action of trespass: *Harper v. Charlesworth*, 4 B. & C. 574. At worst the amendment of the license is equivalent to an assignment by the Crown to the plaintiffs of the value of the timber. There is no question of title to growing timber involved. This is an action for the value of logs cut before action, and the title to the land on which the logs were cut come into question: *McLaren v. Ryan*, 22 V. C. R. 207.

Moss, Q. C., in reply. Damages assessed by the jury.

Judgment February 28th, 1894. OSLER, J. A. :—

**OSLER,
J.A.**

The Act respecting timber on public lands expressly enacts that no license to cut timber on the ungranted lands of the Crown shall be so granted for a longer period than twelve months; that it shall describe the lands on which the timber may be cut; and as to its operation, that it shall confer for the time being on the nominee the right to take and keep exclusive possession of the lands so described, and shall vest in the holder thereof all rights of property whatsoever in all trees, timber and lumber cut within the limits of the license during the term thereof, whether by the authority of the holder, or by any other person, with or without his consent, and shall entitle the holder to seize such trees, etc., where found in possession of any unauthorized person, and to institute actions against any wrongful possessor; and to prosecute trespassers and recover damages; and that all proceedings pending at the expiration of any license may be continued to final termination as if the license had not expired.

No language could more forcibly express the limitation of the right of the holder to the period of the license, as well as the limitation of the period for which it may be granted, and the license itself is expressed, as it ought to be, in accordance with the requirements of the Act. It is needless to say that no conditions, regulations or restrictions can be established by the Lieutenant-Governor in Council which are opposed to these requirements, nor are we informed that any such have been attempted to be established. The legal right of the licensee, except as excepted by the last clause of section 2 of the Act, ceased with the expiration of each license, and I am not aware of any equitable right to a renewal capable of being enforced against the Crown. That is a matter which rests with the Crown, which no doubt will act justly in each particular case. But there is nothing, so far as I know, to prevent the Crown from withdrawing any lot from a timber limit, and declining to renew the license over such lot at the

expiration of the license year. In the present case the particular lot or island was omitted from the license of 1884-5, and from all subsequent licenses, and while it was so omitted the defendants, under the circumstances above mentioned, entered upon it and cut and removed the timber. It may be that this omission was by oversight or error; but the fact remains that when the trespass was committed the island was not under license to any one, and the plaintiffs had not then or thereafter any enforceable legal or equitable right against the Crown in respect of it.

Judgment.

 OSLER,
J.A.

It is impossible to suppose that an officer of the department—be he the commissioner or chief clerk—could by inserting the island in the expired license, confer a right upon the licensee to bring an action in respect of a trespass committed thereon years before. If the defendants had no title to this timber under the patent they may have been trespassers, but if so, they were accountable to the Crown for their acts, and could not be made accountable to the plaintiffs by an attempted correction of the expired license. I adhere to what was said by the Chief Justice of this Court and by myself on the subject of these timber licenses in the recent case of *McArthur v. Northern and Pacific Junction R. W. Co.*, 17 A. R. 86. In doing so I hold nothing contrary to what was actually decided by the Queen's Bench in *McLaren v. Ryan*, 36 U. C. R. 307, though it will be seen that I do not concur in the suggestion of Wilson, J., at p. 313, that the licensees have any right of pre-occupancy to the limits which can give them a continuous right covering periods for which they are not actually under license.

What is said by the late Chief Justice Moss in *Contois v. Bonfield*, 27 C. P. 84, in appeal, is in point. There the defendant contended that he had the right to take advantage as against the plaintiff, the patentee of the Crown, of an alleged agreement by the plaintiff that the Crown should, notwithstanding the patent, have the right to deal with the timber on the granted land. The Chief Justice says :—"It was suggested upon the argument that

privity was met by the
 license for the period of
 stated as a *quasi* assign-
 which could have been
 instance. The answer
 of the commissioner
 statute, that an agree-
 is something which the
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 could be attributed. They
 are looking after their limits,
 or in any way in po-
 and it was not in fact
 the year when the defen-

on the grounds I have
 consider whether the juris-
 reason of the title to
 foundation.

appeal. The first is, that
 title to land, and that,
 jurisdiction; and the
 the defendants may be
 reason.

I shall consider the second question first, for if it must be decided in favour of the appellants, it is not necessary to consider the other.

Judgment.

MAOLENNAN,
J.A.

There is no doubt that for five years prior to the 1st May, 1883, the plaintiffs had a right to the timber in question, and could prosecute any one who interfered with it. That right was a legal right by virtue of the statutes, and the licenses issued to them from year to year. On the 1st of May, 1883, however, that legal right came to an end, for the subsequent licenses did not include island "N," and for nearly nine years the right of the plaintiffs was merely a right to have the island restored to the license in accordance with the departmental regulations.

In the meantime the island was sold under the Mining Act on the 24th of September, 1884, but the patent reserved the pine as directed by the statute, and the statute declares the effect of the reservation to be that the pine continued to be the property of the Crown, and could be taken away by the licensee. Therefore the pine never belonged to Campbell, and never passed to any of his assigns, and the defendants never had any title to it either legal or equitable. Not only did the patent reserve the timber, and refer to the statute which declared the effect of the reservation, but the patent itself was registered, and the defendants have no sort of excuse on the ground of ignorance, if they were ignorant, that the timber was reserved. It may be as they say, that they bought the island for the sake of the timber, and that the price they paid was fixed with reference to its value, and not merely to the value of the island as distinct from the timber; that makes their case one of some hardship and commiseration for their mistake, but does not affect their legal rights or liability. If they had made the slightest examination of the title they would have found that the pine timber was the property of the Crown.

The case, therefore, stands exactly as if no patent had ever issued, and it is clear that the defendants cut down and removed not their own timber but the timber of the

Judgment. Crown, and the remaining question is whether the plain-
MACLENNAN, tiffs can maintain the present action against them for so
J.A. doing.

In *McArthur v. Northern and Pacific Junction R. W. Co.*, 17 A. R. 86, I gave reasons for thinking that during an interval between the license of one year and its renewal in the following year, the timber which is the subject of the license continues, as against a trespasser, to be in equity the property of the license holder, for which he can maintain a suit upon equitable grounds, by reason of the right of renewal given by the regulations of the department.

I did not think that the case of *Contois v. Bonfield*, 27 C. P. 84, in this Court, decided otherwise; two of my learned brothers thought differently, and my brother Burton expressed no opinion on the point. In the latter case the license holder did ultimately, on the strength of his license, and with the assistance of the Attorney-General, in a suit in Chancery, succeed in maintaining his right to the timber, although the legal property had passed to Contois by the patent.

If my opinion in the *McArthur* case is wrong, then the plaintiffs can clearly not recover in this action, for they had no license when the timber was cut and removed, nor for a long time afterwards, and it is not easy to see how the mere insertion of the island in an expired license, or its insertion in one issued for a period of time long subsequent to the cutting and removal, can have any effect whatever. But even if I was right in the opinion I expressed in the *McArthur* case the plaintiffs must equally fail, for the legal property in the timber when it was cut and removed was not in the plaintiffs, but in the Crown, and the title of the plaintiffs, if they had any, was purely equitable. The only person who could sue the defendants for their trespass in an action at law is the Attorney-General on behalf of the Crown, and the plaintiffs could sue in their own name only in a Court having equitable jurisdiction, which the District Court does not possess.

It thus becomes unnecessary to determine the other **Judgment.** objection, namely, whether title to land was involved, a **MACLENNAN,** question apparently not free from difficulty. **J.A.**

I am, therefore, of opinion that the appeal should be allowed, and that the action should be dismissed.

HAGARTY, C. J. O.:—

I agree in the judgment of my brother OSLER.

Appeal allowed with costs.

STOVEL V. GREGORY.

Statute of Limitations—Possession—Trespass—Fencing—“State of Nature”—R. S. O. ch. 111, sec. 5, sub-sec. 4.

The expression “state of nature” in sub-section 4 of section 5 of R. S. O. ch. 111 is used in contra-distinction to the preceding expression, “residing upon or cultivating,” and unless the patentee of wild lands, or some one claiming under him, has resided upon the land or has cultivated or improved it or actually used it, the twenty years’ limitation applies. Clearing or cultivating by trespassers will not avail to shorten this limit.

Per BURTON, and MACLENNAN, JJ.A. Merely fencing in a lot without putting it to some actual, continuous use is not sufficient to make the statute run.

Judgment of the Queen’s Bench Division affirmed.

THIS was an appeal by the defendant from the judgment of the Queen’s Bench Division. **Statement.**

The action was brought to recover possession of park lot 9, on the south side of Princess street, in the town of Mount Forest, and was commenced on the 14th of November, 1892. The plaintiff purchased the lot on the 22nd of September, 1892, from the devisees of one W. T. Renwick, to whom the lot had been granted by the Crown in the year 1859. The defendant claimed title by possession, and the action was tried at Guelph, on the 3rd of April, 1893, before ROSE, J., who dismissed it with costs.

Statement. It appeared that the lot, when granted to Renwick, was heavily wooded and entirely unenclosed and uncultivated, and that neither the patentee nor any one claiming under him had ever resided upon the lot or enclosed it or cleared it or cultivated any part of it. From time to time, however, trespassers had entered upon the lot and had cut timber from it, so that in the year 1872 it was almost completely cleared. The defendant lived near the lot on the north side of Princess street, and was the owner of lot 8 on the south side of Princess street, which was fenced in, lying immediately to the east of the lot in question, and he was also lessee of lot 10 on the south side of Princess street, lying immediately to the west of the lot in question. Lot 10 was bounded on the west by a railway fence, and all three lots were bounded on the south by the fence of a highway. In the year 1872, the defendant enclosed lot 10 and about twenty-five feet from north to south of lot 9. Subsequently, in the year 1874, the fence on lot 9 running from north to south, was removed by the defendant, and he then built a fence to the north of lots 9 and 10, from the north-west angle of lot 8 to the railway fence, but instead of following the northerly boundary of the lots, he placed the fence a foot or two on Princess street, so that, as he said, he might not "lose the fence if the owner should come along." According to the registered plan of the lots in question, there was an allowance for a street between lots 9 and 10, running south from Princess street. This street was not laid out on the ground, and its east and west sides were not fenced in, and the defendant's fence ran across it. It was proved that the taxes had been paid by the patentee down to the time of his death, but it was not shewn in whose name the lot had been assessed. After building the fence in 1874, the defendant used the lot in summer for pasture land, but did not cultivate it, and made no use of it in winter, though sometimes with, as he stated, his permission, brushwood and chips were taken from it in winter by a neighbour. There was some evidence of knowledge

on the part of the patentee of the proceedings of the defendant, but it is unnecessary to set out this evidence, as the decision did not in any way turn upon this question. Statement.

The plaintiff appealed from the judgment of ROSE, J., and the appeal was allowed by the Queen's Bench Division, on the 29th of May, 1893.

The defendant then appealed to this Court, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 27th and 28th of March, 1894.

H. J. Scott, Q. C., and William Kingston, Q. C., for the appellant. The Queen's Bench Division decided this case in favour of the plaintiff partly on the ground that when possession was taken by the defendant the land was in a state of nature, so that the twenty years' limitation applied, and partly on the ground that the possession by the defendant was not of such a continuous nature as to make the statute run. On neither ground, we submit, can the judgment be supported. Putting the fence round the lot without cultivating it or making any actual use of it, is a sufficient taking of possession to make the statute run. Were it not so, then the statute would never apply to any land that cannot be cultivated. There does not seem to be any decision holding, in so many words, that fencing alone is sufficient, but that inference may fairly be drawn from several of the cases: *Shepherdson v. McCullough*, 46 U. C. R. 573; *McConaghy v. Denmark*, 4 S. C. R. 609. *Coffin v. North American Land Co.*, 21 O. R. 80, has been relied on, but that case is plainly distinguishable. There the land in question had been fenced in by the true owner and not by the person claiming title by possession. Even in the United States, where the doctrine of adverse possession still prevails, fencing has been held sufficient: *Sedgwick and Wait on Title to Land*, sec. 730, *et seq.*; *Angell on Limitations*, 6th ed., sec. 383. The fact that the road allowance has been included

Argument. within the fences, can make no possible difference. No doubt, no title could be acquired to the road allowance, but that would not affect the case as far as the portions of land owned by private owners are concerned. Nor does the fact that the fence on the north is on the street and not on the true boundary, alter the legal position. To so much and no more of private property as is within the fences, has title by possession been acquired. The Court below is also wrong, we submit, in holding that this land was in a state of nature within the meaning of sub-section 4 of section 5 of R. S. O. ch. 111, when possession was taken by the defendant. The timber had been cut off, and surely when that had been done, the lot could no longer be said to be in a state of nature. These words must be interpreted to mean "untouched by man," and it matters not whether the change in the condition of the lot has been effected by trespassers or by the true owner; the condition of the lot at the time that possession is taken must govern. Unless this be so, a lot might be cleared and cultivated, and yet because the clearing and cultivating have not been effected by the true owner, title by possession could not be obtained until twenty years have elapsed.

W. R. Meredith, Q. C., and H. Elliot, for the respondent. This is a case which calls for the strictest proof of possession. The whole scope of the Act requires that possession must be continuous and visible, and the possession of the defendant was neither one nor the other. The only use made by him of the lot in question, was that of pasturing his cattle upon it in summer, and this use amounts to no more than a series of isolated acts of trespass. No case goes so far as to hold that fencing a lot without doing more is sufficient to give title by possession, and certainly in a case like this, where other lands and a portion of a highway have been included, the right should not be admitted. But there is a clear answer to the claim to title by possession, under sub-section 4 of section 5. The land was clearly in a state of nature when granted by the Crown, and it is admitted that neither the patentee, nor any one

claiming under him, has done anything whatever to it. **Argument.**
The sub-section speaks of the case where actual possession has not been taken by the grantee or those claiming under him "by residing upon or cultivating some portion thereof," and then speaks of possession being taken by some other person "while the land was in a state of nature." Clearly the expression "state of nature" is here used in contra-distinction to the expression "by residing upon or cultivating some portion thereof," and land is, within the meaning of the section, in a state of nature, unless the grantee or some one claiming under him has actually resided upon or cultivated some portion thereof. To adopt the construction contended for on behalf of the appellant, would lead to manifest absurdity. Under that construction, a timber licensee or trespasser might enter upon land and cut a few trees, and then it could no longer be said that the land was "untouched by man," so that the true owner, without any default on his part, would be barred at the expiration of ten years. The same absurd result would follow if a little gravel were removed, or if by cultivation or drainage of an adjoining lot, a piece of swamp, containing perhaps valuable timber, were drained. The only reasonable construction to give to the section is to limit it to entry and improvement by the true owner. It is material also to notice that the section speaks of the "land" being in a state of nature, as if to shew that the soil itself was being referred to, for in other parts of the same section the plural "lands" is used where the property in general is being referred to.

H. J. Scott, Q. C., in reply, A reasonable construction must be put on the appellant's contention, and it should not be pushed to absurdity. Of course, if only one or two trees were cut from a lot, that would be such a trifling alteration in its condition that it could well be said to be still in a state of nature. Perhaps the definition contended for by the appellant might be amplified into "untouched by man to such an extent as to alter the general condition of the lot."

Judgment. HAGARTY, C. J. O. :—

HAGARTY,
C.J.O.

I do not think that it is necessary for us to reserve our decision in this case. It has been fully argued, and although we have not had the advantage of any written reasons for the judgment of the Queen's Bench Division, I think from what we have heard from counsel as to those reasons, that we can, without difficulty, agree in the conclusion arrived at. I am clearly of opinion that the true construction of sub-section 4, of section 5, is to provide a limitation of twenty years, unless the grantee, or some one claiming under him, has actually resided upon the land in question or has cultivated it or improved it in some other way. I do not think that the cutting of timber by trespassers or timber licensees can affect the rights given by this section. The point as to fencing is, in my view, more doubtful, and I do not wish to give a definite opinion upon that point, though, as at present advised, I am against the defendant on that point also.

BURTON, J. A. :—

I also think that the expression "state of nature" is used in contra-distinction to "residing upon or cultivating," but I do not wish to rest my judgment on this point alone, for I am of opinion, that to acquire title by possession, it is not sufficient to merely fence in a piece of land. Some actual use and occupation of the fenced in portion must be shewn in addition. Here, in my view, the acts done by the defendant were mere isolated trespasses, and were not sufficient to cut out the title of the true owner. There is, I think, also much to be said in favour of the view, that fencing of this kind, where a highway has been included, would not, in any event, be sufficient to confer title.

OSLER, J. A. :—

I give no opinion on the question of obtaining title by fencing, but on the other point it is clear, to my mind, that the defendant has acquired no title. Neither the

grantee of the Crown nor his assigns took possession of the land by residing upon or cultivating it. The appellant does not claim to hold under him. Then did he take possession of the land while it was in a state of nature within the meaning of section 5, sub-section 4, of the Limitation Act? What is the meaning of that expression? Does it mean in such a state as it happens to be until it has been altered by the hand of man by cutting trees or otherwise trespassing upon it? Or, is it not rather to be regarded as set in opposition to the words used in the earlier part of the clause in reference to the possession of the grantee of the Crown: "residing upon or otherwise cultivating it"? I think that is the proper construction; and therefore as the grantee of the Crown while entitled to the land had no knowledge of its being in the actual occupation of the defendant, the plaintiff must succeed, as the twenty years' bar is not complete.

Judgment.

OSLER,
J.A.

MACLENNAN, J. A. :—

I entirely agree with the view of my brother Osler as to the effect of sub-section 4 of section 5. I also agree with my brother Burton, in the view that, apart from that sub-section, no sufficient possession has been shewn. I do not think that merely fencing in the lot without putting it to some actual continuous use is sufficient to make the statute run.

Appeal dismissed with costs.

BRETHOUR V. BROOKE ET AL.

*Mortgage—Power of Sale—Lease—Possession—Timber—R. S. O. ch. 107,
clauses 7, 17.*

Statement. THIS was an appeal by the plaintiff from the judgment of BOYD, C., reported 23 O. R. 658, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 2nd of April, 1894.

*G. Lynch-Staunton, and S. Livingston, for the appellant.
W. Cassels, Q. C., and C. E. Oles, for the respondents.*

At the conclusion of the argument the appeal was dismissed with costs, the Court agreeing with the judgment of the learned Chancellor.

REGINA V. MARTIN.

Intoxicating Liquors—Powers of License Commissioners—License Regulations—Liquor License Act, R. S. O. ch. 194.

A regulation by License Commissioners requiring the lower half of bar-room windows to be left uncovered during prohibited hours is valid and reasonable.

Regina v. Belmont, 35 U. C. R. 298, questioned.

Judgment of the County Judge of Wellington reversed.

THIS was an appeal by the Attorney-General for Ontario **Statement.** from the judgment of the Judge of the County of Wellington in General Sessions.

The defendant was convicted on the 30th of March, 1893, by the police magistrate of the city of Guelph, of a breach of the following regulation adopted by the license commissioners for that city:—

“The windows (of every bar-room) shall, during the time the bar-room is required to be kept closed, have at least the lower half of the whole width uncovered by blinds, shutters, or other covering, nor shall any screen or other obstruction be placed at or opposite said windows so as to obstruct the view to the interior of said bar-room.”

This conviction was quashed by His Honour Judge Chadwick, and this appeal was then brought and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 17th of April, 1894.

J. R. Cartwright, Q. C., for the appeal. The learned County Judge quashed this conviction upon the authority of *Regina v. Belmont*, 35 U. C. R. 298, the regulation being, in his opinion, unreasonable, and having nothing to do with the sale of liquor or the proper conducting of the tavern. That case, however, is clearly distinguishable on the facts. The regulation there in question was admittedly an unreasonable one, and was altogether too wide. Moreover, the authority of that case, so far as it attempts

Argument. to lay down any general limitation on the power of the license commissioners, has been in effect overruled by *Hodge v. The Queen*, 9 App. Cas. 117. The effect of the judgment of the Judicial Committee is, that the license commissioners are substituted for the Legislature, and have power to make any regulations that they see fit, so long as such regulations are made in good faith and for the purpose of exercising a proper control over the traffic in spirituous liquors. The point in question on this appeal was discussed by the Common Pleas Division in the unreported case of *Regina v. Johnston*, and a regulation of this kind was there upheld. This case the learned County Judge refused to follow, however, holding that it was inconsistent with the previous decision of *Regina v. Belmont*, which was not brought to the notice of the Common Pleas Division. The reasonableness of the regulation is, I submit, not in question, but if that point is open for discussion at all, it can scarcely be contended that this is not a proper regulation to make. Take, for instance, section 110 of the Liquor License Act, under which a gas or other light seen burning in a bar-room within prohibited hours is made *prima facie* evidence of a sale of liquor. Without a regulation such as is now under discussion, the provisions of that section could be violated with impunity. In *Hodge v. The Queen*, the regulation under consideration was much more arbitrary and much wider, and yet no attack was made upon it on that ground. It is to be borne in mind, too, that the tavern keeper has voluntarily accepted a license subject to certain rules and regulations of which this is one, and he cannot now complain.

James Haverson, for the respondent. This attempted regulation is *ultra vires*. It has nothing whatever to do with the conduct of the business, and is simply passed in order to facilitate the detection of a possible offence. It is unfair, however, to presume that any offence will be committed, and a regulation of this kind makes it utterly impossible to use a bar-room during prohibited

hours for any private purpose, though its use for private purposes is legitimate and proper. Apart from this, such a regulation is unreasonable. In *Regina v. Belmont*, one of the grounds for holding that the regulation prohibiting a light within the bar-room was unreasonable, was that, strictly construed, there would be a breach if the tavern-keeper had a stove burning in the bar-room during prohibited hours, and it was pointed out that without fire, loss and damage might be caused from lowness of temperature. This is the converse case, and if the tavern-keeper is not entitled to have a blind on the window, loss and damage might as easily result from the too great heat of the sun. Argument.

HAGARTY, C. J. O. :—

I do not think, Mr. Cartwright, that we need trouble you for any reply in this case. It seems to me to be a very plain one. The short answer to the contention of the respondent as to the inability to use the room for any other purposes with a regulation of this kind in force is, that the tavern-keeper knows that when he makes a room a bar-room, he brings it within regulations of this kind, and that if he wishes to use it, he must use it subject to these regulations. As to the regulation itself, there is, it seems to me, nothing at all unreasonable about it. The object to be gained by such a regulation is plain, and it is, in my view, intimately connected with the proper oversight of the conduct of the business.

BURTON, J. A. :—

I am of the same opinion. The license was accepted upon certain terms, and these terms must be observed. There is nothing in my view unreasonable about a regulation of this kind.

Judgment. OSLER, J. A. :—

OSLER,
J.A.

I am of opinion that this regulation has not been shewn to be an unreasonable one. I think that the decision in *Regina v. Belmont*, 35 U. C. R. 298, has been, to say the least, very much limited by the subsequent decision of *Hodge v. The Queen*, 9 App. Cas. 117, and that the true reading of that case is that the license commissioners have really been substituted for the Legislature, and are authorized to make such regulations as they see fit in connection with the conduct of the traffic in spirituous liquors. It may be that they might attempt to make regulations so clearly unreasonable as to justify the interference of the Court, but I do not think that this regulation is open to that objection. The commissioners then having power to make it, the appeal must be allowed, and the conviction restored, but I do not think that the respondent should be ordered to pay costs. The appellant can recoup himself out of the fund available for that purpose.

MACLENNAN, J. A. :—

I agree.

Appeal allowed without costs.

MORROW V. CANADIAN PACIFIC RAILWAY COMPANY.

Negligence—Contributory Negligence—Evidence—Onus of Proof—Jury—Non-suit.

In an action to recover damages for negligence, tried with a jury, where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and the defendant, and though the judge may rule negatively that there is no evidence to go to the jury on either issue he cannot declare affirmatively that either is proved. The question of proof is for the jury.

Weir v. Canadian Pacific R. W. Co., 16 A. R. 100, was a non-jury case, and laid down no rule for the disposition of a case tried with a jury. Judgment of the Queen's Bench Division affirmed.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division. Statement.

The plaintiff while driving across the defendants' line of railway at a highway crossing in the township of Rawdon was run into by a train and severely injured, and his horse was killed and waggon broken. He brought this action charging many acts of negligence, such as not ringing the bell, not sounding the whistle, not keeping the approaches to the crossing clear, running at too great a speed, and so forth, the defendants contenting themselves by a general denial, and not in terms pleading contributory negligence. The action was tried before FALCONBRIDGE, J., and a jury, at Belleville, on the 18th of October, 1892. It was shewn by cross-examination of the plaintiff and his witnesses that he had been warned not to cross, and that he had driven on without stopping, or even looking. Upon this the learned Judge dismissed the action holding that the plaintiff had been guilty of contributory negligence, but the Divisional Court ordered a new trial on the ground that the question of contributory negligence should have been left to the jury.

This appeal was thereupon brought, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 21st of March, 1894.

Statement.

McCarthy, Q. C., and *A. MacMurchy*, for the appellants.
Marsh, Q. C., and *E. Guss Porter*, for the respondents.

The evidence was discussed at great length, and the usual authorities were cited, *Weir v. Canadian Pacific R. W. Co.*, 16 A. R. 100, being particularly relied on.

April 16th, 1894. BURTON, J. A. :—

This is an appeal from the Divisional Court reversing the decision of the learned Judge who tried the case, and who non-suited on the conclusion of the plaintiff's case, but as the Divisional Court have given no reasons for their judgment I think that we should, in fairness to the learned Judge and to the parties, considering the great number of very opposite views which have been taken of the important question of the limits within which it is the duty of the judge to decide the case himself, or to leave it to the jury, state our reasons for differing from him.

His Lordship based his decision upon the case of *Weir* against the same defendants in this Court. That case has been frequently misunderstood. No such question could properly have arisen in that case as it was heard by the Judge without a jury, and being thus judge of law and judge of fact he was able to draw his own conclusions of fact.

I also, with great deference, dissent from the learned Judge's view that it was incumbent upon the plaintiff to go further and shew as part of his case that he was not guilty of negligence contributing to the accident. Notwithstanding the diversity of opinion which at one time prevailed I think it is now clearly established that that is a distinct issue, the onus of proving which is on the defendants.

That was, after much conflict of opinion, distinctly laid down by the House of Lords in *Wakelin v. London and South Western R. W. Co.*, 12 App. Cas: 41, where Lord Wat-

son says (p. 47): "I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour." And he proceeds (p. 48): "The difficulty of dealing with the question of onus in cases like the present arises from the fact that in most cases it is well nigh impossible for the plaintiff to lay his evidence before the jury without disclosing circumstances which either point to or tend to rebut the conclusion that the injured party was guilty of contributory negligence. If the plaintiff's evidence were sufficient to shew that the negligence of the defendants did materially contribute to the injury and threw no light upon the question of the injured party's negligence, then I should be of opinion that, in the absence of any counter-evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence. Even if the plaintiff's evidence did disclose facts and circumstances bearing upon that question, which were neither sufficient *per se* to prove such contributory negligence, nor to cast the onus of disproving it on the plaintiff, I should remain of the same opinion." And he then quotes Lord Hatherley's statement in *Dublin, etc, R. W. Co. v. Slattery*, 3 App. Cas. 1169: "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact."

Judgment.

BURTON,
J.A.

To apply these decisions to the present case:—It is shewn upon the evidence, so far as it has been printed, that the defendants were guilty of a breach of the statutory requirements as to ringing the bell, and that the plaintiff was injured whilst crossing their railway on a level with the highway, a *prima facie* case, therefore, of actionable negligence, entitling the plaintiff to recover if there was nothing to establish contributory negligence on his part.

Judgment.
BURTON,
J.A.

The plaintiff himself was examined, and swears that although he knew that that was about the time of the train passing, he received no other warning, and denies that he heard the warning of the witness McInroy; and that he did not see the train until it was close upon him. Mr. McCarthy contends that this was so incredible in the face of the other evidence, that it justified the Judge in dealing with it himself, instead of submitting it to the jury, but he at the same time claims that the witness Neil must have been mistaken when he referred to the whistling having occurred at a much greater distance than he places it, and there is also some evidence of the view being possibly obstructed by shrubs and trees, although this is contested by the defendants.

I am unable to concur in this contention. Whether the evidence is strong or weak, or in the opinion of the Judge incredible, it is equally the province of the jury to decide upon it; and as has been said by a learned Judge, the Judge would be arrogating to himself functions not belonging to himself, if he were, on that account, on the trial of a question of fact, to withdraw the evidence from the jury and decide on it himself.

But this is, I think, made very clearly apparent when we consider the nature of the issues. There were two:

1st. Whether the defendants were guilty of negligence causing the accident.

2nd. Whether there was negligence on the part of the plaintiff contributing to it.

The first of these issues was upon the plaintiff; the second upon the defendants. Both are questions of fact.

Upon each of these issues it is competent to the Judge to say negatively that there is not sufficient evidence to go to the jury, but it is no more competent to him to declare affirmatively that one is proved than the other. He might hold in a proper case that there is no evidence for the jury of contributory negligence but the moment that the question arises as to whether the injury resulted from the negligence of the defendants or the

plaintiff, or in other words, the moment it appears that the facts and the proper inferences from the facts are in dispute, it becomes a question for the jury.

Judgment.

BURTON,
J.A.

Here there was some evidence of negligence on the part of the defendants, from which the jury might have come to the conclusion that it caused the injury to the plaintiff; but it is equally clear that there was evidence from which the jury might have come to the conclusion that the plaintiff was the author of his own wrong; but they were solely issues for the jury not for the Court.

I think, therefore, that the learned Judge ought to have submitted the case to them and that the appeal should be dismissed, and a new trial ordered.

OSLER, J. A. :—

Had this case been tried without a jury we should have found it difficult to hold that the learned trial Judge was wrong in dismissing the action. But as there was a jury it was their province to decide the question, arising upon disputed facts, whether the defendants were guilty of negligence causing the accident, and the further question arising in the same way whether the plaintiff was guilty of contributory negligence. The learned trial Judge relied upon the case of *Weir v. Canadian Pacific R. W. Co.*, 16 A. R. 100, but in that case there was no jury, as the report shews, and this Court passed upon the facts—the undisputed facts as I may say—in the way in which they held the trial Judge should have done trying it as he was without a jury. Here there was some evidence, the weight of which the jury was to determine, of the omission to give the statutory warning of the approach of the train. Was the whistle given at the whistle board near the crossing, or, as the witness Neil says, at the distance of a mile and a-half away? It is argued very forcibly that from the rate at which the train was going, the distance which the plaintiff was from the crossing and the rate at which he was driving, Neil must

Judgment

OSLER,
J.A.

have been mistaken as otherwise the plaintiff would have been over the crossing long before the arrival of the train at that point, and therefore, that the whistle heard by him must have been given at the proper place, the whistle board for that particular crossing. It was, however, for the jury, and not for the Judge, to draw the inference from the facts sworn to as to where the warning was given.

Then as to contributory negligence. It was not for the plaintiff to make out affirmatively as part of his case that he had not been guilty of it. What is said in the Court of Appeal in *Davey v. London and South Western R. W. Co.*, 12 Q. B. D. 70, as to this cannot be followed since the decision of the House of Lords in *Wakelin v. London and South Western R. W. Co.*, 12 App. Cas. 41. It may appear in the course of the plaintiff's case that he was the author of his own injury; that he himself and not the defendants caused it and then the Judge may properly non-suit, or dismiss the action, not on the ground that the plaintiff was guilty of contributory negligence, but on the ground that he has failed to shew that it was the defendants' negligence which caused the damage of which he complains. Contributory negligence is a defence to the action, and it is for the defendants to prove it, as they may no doubt upon uncontradicted facts appearing in the plaintiff's own case, or the judge may rule that there is no evidence of it. I refer also to *Brown v. Great Western R. W. Co.*, 1 Times L. R. 406, 614, and to *Wright v. Midland R. W. Co.*, 1 Times L. R. 406, 412.

As regards the *Davey* case, it is worth noticing that the Master of the Rolls in both of the cases I have just cited takes occasion to say: "If it pleases any body to hear it I have doubted ever since I gave that judgment whether my brother Baggallay (the dissenting Judge) and my brother Manisty (the trial Judge), were not more right than we were (*i. e.*, himself and Lord Justice Bowen). I have doubted whether even in that case we ought to have taken it from the jury."

On the question of contributory negligence, the facts and inferences from the facts are in dispute. What did the man McInroy say to the plaintiff? Did the plaintiff hear it? What was said by the doctor to McInroy in the plaintiff's presence? Did the plaintiff hear it or was he in a condition to apprehend it, or to be called upon to contradict it? So also with reference to the position of the train when the plaintiff was about to cross the line. How far could it be seen? Was there anything to obstruct his view? All these are matters for the consideration of the jury in determining whether the defendants have made out a defence on the ground of contributory negligence; and, as the Court below say, whether the plaintiff took reasonable precautions under the circumstances.

Judgment.

OSLER,
J.A.

I think the judgment appealed from should be affirmed, and the appeal dismissed.

HAGARTY, C. J. O., and MACLENNAN, J. A., concurred.

Appeal dismissed with costs.

THE BANK OF HAMILTON v. SHEPHERD ET AL.

BAILEY ET AL. v. THE BANK OF HAMILTON.

Banks and Banking—Security—Contemporaneous Advance—Bills of Exchange and Promissory Notes—Renewal—Substitution of Securities—Assignments and Preferences—Confession of Judgment—Cognovit Actionem—53 Vic. ch. 31, secs. 74, 75 (D.)—R. S. O. ch. 51, sec. 113—R.S.O. ch. 124, sec 1.

A renewal of a note is not a negotiation of it within the meaning of section 75 of the Bank Act, 53 Vic. ch. 31 (D.), so as to support a security taken at the time of the renewal in substitution for a previously existing security.

A withdrawal of defence under section 113 of the Division Courts' Act, R. S. O. ch. 51, is not a confession of judgment or *cognovit actionem* within the meaning of section 1 of the Assignments and Preferences Act, R. S. O. ch. 124.

Judgment of ARMOUR, C. J., affirmed.

Statement.

THESE were appeals by the Bank of Hamilton from the judgments of ARMOUR, C. J., in two interpleader issues arising out of the failure of one T. E. Essery, who was a dealer in live stock, carrying on business near Orangeville.

In the first issue the bank claimed some horses and cattle under an instrument in the nature of a warehouse receipt made by Essery in their favour on the 3rd of June, 1892, which purported to be made in consideration of an advance of \$4,000 by the bank to him. It was shewn that at the time this instrument was taken by the bank no actual advance was made, but that a note made by Essery, collaterally secured by another instrument of the same kind made by him covering other cattle, was given up to him and a new note taken.

The only question arising in the second issue was as to the validity of a seizure in a Division Court action by the plaintiffs in the issue against Essery, judgment having been obtained in that Division Court action against him by the withdrawal of his defence under section 113 of the Division Courts Act, R. S. O. ch. 51.

The issues were tried together at Orangeville on the 1st of May, 1893, before ARMOUR, C. J., and were decided

against the bank, and their appeal was argued before **Argument.**
HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN,
JJ.A., on the 29th and 30th of March, 1884.

W. Nesbitt, and *A. Monro Grier*, for the appellants. The very point in question in the Shepherd case has been decided favourably to the present appellants in *Bank of Hamilton v. Noye Manufacturing Company*, 9 O. R. 631, but the learned Chief Justice refused to follow that case. There it was held that a substitution of securities was equivalent to a present advance, and we submit that this is the reasonable construction of the two sections in question, 74 and 75 of the Bank Act of 1890, 53 Vic. ch. 31, (D.). The latter section speaks of negotiation, and exchange is negotiation: *Yerkes v. National Bank*, 69 N Y. 382.

In the Bailey case the only question is, whether the withdrawal of a defence is a *cognovit actionem*, or confession of judgment, within R. S. O. ch. 124, sec. 1. The proper conclusion from the evidence is, that the defence was withdrawn for the fraudulent purpose of enabling the plaintiffs to obtain judgment and sell the goods, and it should be set aside.

[The Court held that the withdrawal of the defence was not a *cognovit actionem*, or confession of judgment, and dismissed the appeal. See *Macdonald v. Crombie*, 11 S. C. R. 107.]

Fullerton, Q. C., *E. Myers*, and *J. N. Fish*, for the respondents. There was in fact no present advance when the security now in question was taken. There was merely a wiping out of the old indebtedness by the substitution of a new note, and this has been held insufficient in *Bank of British North America v. Clarkson*, 19 C. P. 182. *Bank of Hamilton v. Noye Manufacturing Company*, 9 O. R. 631, is inconsistent with that case, and is moreover distinguishable, for there possession was actually taken by the bank before the issue of execution. It is too late for the bank to fall back upon the original security, for that covered

case of *Coffey v. Quebec*
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341, 68 L. T. N. S. 29.
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dent debts overdue or maturing, and is not brought within the statute.

I am of opinion that the learned Judge was right, and that this appeal should be dismissed.

Judgment.

BURTON,
J.A.

OSLER, J. A. :—

The plaintiffs relied upon their assignment for advances as a valid security upon the property in question under section 74 of the Bank Act.

It is unnecessary to decide whether Essery, their customer, by whom the assignment was given, was a wholesale purchaser or shipper of live stock within the meaning of the section, who could confer a valid title under the Act on the bank to the property mentioned therein. I entirely agree with the judgment of the learned trial Judge in holding that the instrument in question is not a security within the meaning of sections 74 and 75, because it was not given to secure a bill, note, or debt negotiated or contracted at the time of the acquisition thereof by the bank, but a past due debt. The fact that for the debt when originally contracted the bank held security, which they gave up when the renewals were taken, cannot assist them. The bill or note may be renewed without affecting the security, but it is not contemplated that the latter shall be given up and fresh security taken on the renewal.

I do not assent to the argument that the bank can be affected with notice of the purpose for which the money is borrowed ; if the borrower is a person who comes within the Act as a wholesale purchaser or shipper, that is all that is necessary to protect the bank in making the advance and taking the security.

HAGARTY, C. J. O., and MACLENNAN, J. A., concurred.

Appeals dismissed with costs.

THE KERR ENGINE COMPANY V. THE FRENCH RIVER TUG
COMPANY.

Contract—Penalty—Delay Caused by Contractee—Damages—Time.

Where a contract provides that an engine shall be built and placed in position by a certain date, with a penalty for each day's delay, the time of commencement is of the essence of the contract, and if owing to the purchaser's fault, the contractor is materially delayed in commencing the work, the parties are at large so far as the penalty is concerned, the purchaser, if the work be not completed by the time fixed, being entitled only to actual damages.

Holme v. Guppy, 3 M. & W. 387, followed.

Judgment of the Queen's Bench Division reversed.

Statement. THIS was an appeal by the plaintiffs from the judgment of the Queen's Bench Division.

The plaintiffs were manufacturers of marine engines and boilers, and entered into a contract to make for the defendants an engine and boiler for a tug that was being built for them. Dates were fixed in the contract for the completion of different stages of the work, time being made of the essence of the contract, and it was "stipulated and agreed that for each and every working day after the dates hereinbefore specified for the completion of said work that said engine and boiler are incomplete and unfinished, said first party (the plaintiffs) shall forfeit and pay said second party (the defendants) the sum of twenty dollars as and for damages to it by reason of such delay."

The action was brought to recover a balance of the contract price and an amount claimed for extras, and the defendants contended that there had been sixty days delay in completing the work and claimed the right to set off \$1200.

The action was tried at Sandwich on the 27th of October, 1892, before BOYD, C. It was admitted that the work had been satisfactorily done, but it was shewn that it had not been completed till long after the appointed time, and there was much contradictory evidence as to the causes of, and responsibility for, the delays. Though the defendants had

set up in their defence that they had suffered loss and damage by reason of the delay they gave little evidence of damage contenting themselves by relying mainly on the penalty clause of the contract. It was proved that the plaintiffs, owing to the fault of the defendants, had not been able to begin work for two weeks after the contract was made, and the learned Chancellor, after apportioning the blame for the various delays between the parties, charged the plaintiffs with \$280 as the penalty for fourteen days out of the total time lost. Statement.

On appeal by the defendants and cross-appeal by the plaintiffs the Queen's Bench Division took a different view of the causes of the delays, and made a very much larger deduction ; upon which the plaintiffs appealed to this Court and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 27th of March, 1894.

McCarthy, Q. C., for the appellants. The learned Chancellor and the Queen's Bench Division have treated this case as one in which the penal clause is binding, but have differed in their views of the evidence as to the causes of the delays. Both tribunals have, however, I submit, erred, and have viewed the case from a wrong stand point. I contend that this case is governed by the old, but well decided, case of *Holme v. Guppy*, 3 M. & W. 387, and that, the plaintiffs having been delayed by the defendants in beginning the work, the parties are at large and are not bound by and cannot take advantage of the penal clause. The defendants can get only such damages as they have actually suffered, and there is no evidence of actual loss. But even if that clause can be invoked the judgments are wrong. [The learned counsel then proceeded to discuss the evidence, contending that any delays chargeable to the plaintiffs were counter balanced by delays chargeable to the defendants.]

Moss, Q. C., and *O. E. Fleming*, for the respondents.

Argument. The penal clause governs and the evidence fully supports the findings of the Queen's Bench Division. *Holme v. Guppy*, 3 M. & W. 387, is explained in Hudson's Law of Building Contracts, p. 203, and does not apply here. To relieve from the penal clause a new contract must be shewn: *Appleby v. Myers*, L. R. 2 C. P. 651. There was evidence of actual damage to more than the amount deducted, and the defendants are entitled to set-off this: *Hamilton v. Moore*, 33 U. C. R. 520.

McCarthy, Q. C., in reply.

April 16th, 1894. The judgment of the Court was delivered by

HAGARTY, C. J. O. :—

The attention of the learned trial Judge was not called to the legal objection first taken in the Divisional Court, viz., as to the legal effect of the delay of two weeks caused by the action of the defendants in the execution of the contract, thus materially shortening the period allowed for the completion of the work.

I think the judgment of the learned Chancellor (apart from the legal objection), as to the time that should be properly allowed, is fair and just between the parties, and I would be very reluctant to interfere with it.

In the Divisional Court the point was raised that the delay caused by the defendants' shortening the time allowed for doing the work was an answer to all claims for the penalties.

But the learned Chief Justice disposes of this objection, taken under the leading case of *Holme v. Guppy*, 3 M. & W. 387, by holding that it did not apply, as the plaintiffs "have brought their action upon the contract, and it is manifest that it was under this contract that they did the work."

I see no difficulty in the plaintiffs' way on this ground. Under our present system (or rather no system) of plead-

ing, the claim is set out exactly as it appears on trial. A contract entered into; the readiness of the plaintiffs at once to enter on the work; the delay wrongfully caused by the defendants; the thereby disorganization of the plaintiffs' arrangements, and their contention that the parties were thereby "put at large under the contract." They also set out other alleged delays caused by the defendants.

The defence claims (*inter alia*) the penalties or damages per day provided in the contract.

We have now to consider whether the doctrine of *Holme v. Guppy*, 3 M. & W. 387, applies.

I do not think that the authority of this case has been ever substantially questioned; and there seems to be nothing, assuming it to be good law, to prevent its application to the case before us.

It was decided in 1838. In 1862, Byles, J., remarked: "*Holme v. Guppy* is not only in point, but it is consistent with the ancient authorities, and is founded on the most invincible reason and good sense": *Russell v. Da Bandeira*, 13 C. B. N. S. at p. 205.

In our case time is stated to be of the essence of the contract in emphatic terms.

Parke, B., says: (*Holme v. Guppy*, 3 M. & W. at p. 389.) "The plaintiffs undertake that they will complete the work in a *given* four months and a half, and the particular time is extremely material, because they probably would not have entered into the contract unless they had had those four months and a half within which they could work a greater number of hours a day. Then it appears that they were disabled by the act of the defendants from the performance of *that* contract; and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default." See the case discussed in Hudson's Law of Building Contracts, p. 203 *et seq.*

I cannot distinguish this case from the present. A fortnight's prevention of the plaintiffs commencing their work,

Judgment.

HAGARTY,
C.J.O.

Judgment.
HAGARTY,
C.J.O.

cannot be considered as too trifling a fraction of a little over three and a half months time allowed for doing the work, at all events where a considerable forfeiture is involved.

I do not see how we can hold that this delay did not put an end to the forfeiture clause; and in this view the appeal must be allowed, and the judgment of the trial Judge must stand, increased by the sum of \$260, being for fourteen days penalties at \$20 a day, less \$20 admitted to have been paid.

As the case is presented to us, we have only the question of the defendants' claim for the penalties or liquidated damages for our consideration.

Appeal allowed with costs.

HEADFORD v. THE MCCLARY MANUFACTURING COMPANY.

Master and Servant—Workmen's Compensation for Injuries Act—R. S. O. ch. 141—Way—Defect—Hoist.

The plaintiff, a workman, in going to his work, in the defendants' manufactory, passed as usual through a long passage, twelve feet wide, well lighted, and with which he was well acquainted, but instead of going straight to his work turned out of his way to look at some repairs that were being made on the elevator on the opposite side of the passage from where he should have been, and fell into the unguarded hole:—

Held, that there was no defect in the condition of the "way," within the meaning of the Workmen's Compensation for Injuries Act, R. S. O. ch. 141, for which the defendants were responsible.

Judgment of the Chancery Division, 23 O. R. 335, affirmed on other grounds.

Statement. THIS was an appeal by the plaintiff from the judgment of the Chancery Division, reported 23 O. R. 335, where the facts and arguments are fully set out, and was argued before HAGARTY, C. J. O., BURTON, OSIER, and MACLENNAN, JJ. A., on the 12th of March, 1894.

Gibbons, Q. C., for the appellant.

W. Nesbitt, and *A. Monro Grier*, for the respondents.

April 16th, 1894. BURTON, J. A. :—

Judgment.

BURTON,
J.A.

I agree in the result that the non-suit should stand, but I desire to state the precise grounds on which I come to that conclusion.

The plaintiff was in the employ of the defendants, and complains of their negligence in leaving a hoist hole upon the premises where he was employed unprotected, by reason of which he fell in and was injured.

In order for the plaintiff to recover it was necessary for him to establish affirmatively some breach of duty arising from the defendants to himself, and that the injury resulted directly from that breach of duty.

At the time of the accident some repairs were being made at the hoist. The plaintiff had been for some time in the employment of the defendants, and was accustomed to go to the department in which he worked by a passage one side of which was some twelve feet distant from the hoist, that is to say, the passage way was some ten or twelve feet in width, and in the course which he usually took he would be about eight or nine feet from the hoist.

It was broad day light, and there was no difficulty in the plaintiff seeing that the opening was unprotected, and that workmen were engaged in making repairs.

There was no necessity for the plaintiff being there, and he was quite out of the course which he usually took in going to the carpenters' shop in which he worked. It appears to me, therefore, there was no breach of any statutory obligation by the defendants towards the plaintiff, and even if there had been that was not the cause of the accident. Knowing the premises as he did the case is substantially the same as if he had been warned by his employers not to go near the hoist, as it was being repaired. The accident, therefore, was attributable, not to the negligence of the defendants but to that of the plaintiff.

The plaintiff failed to establish the case made in his statement of claim.

HAGARTY, C. J. O., and MACLENNAN, J. A., concurred.

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taken into consideration, the accident was attributable to his negligence, and not to that of the defendants, and that there was nothing on which a jury could reasonably have found otherwise, I will not dissent, though I concur with reluctance. I refer to *Denny v. Montreal Telegraph Co.*, 42 U. C. R. 577, and the cases cited in the judgment of Wilson, J. As our judgment proceeds on the ground that there was no defect in the condition of the way, the provisions of the Factories Act cannot assist the plaintiff, nor, as regards that Act, am I prepared to say that under the circumstances disclosed the defendants were in fault, for they seem to have had a sufficient guard across the opening in the shape of a bar, which had been raised at the time of the accident in order to admit of repairs being done to the hoist.

Judgment

OSLER,
J.A.

Appeal dismissed with costs.

YORK ET AL V. TOWNSHIP OF OSGOODE ET AL.

*Waters and Watercourses—Ditches and Watercourses Act—R. S. O. ch. 220
—“ Owner ”—Tenant at Will.*

The word “owner” as used in the Ditches and Watercourses Act, R. S. O. ch. 220, means the actual owner and not the assessed owner; and a tenant at will of land affected, assessed as owner, is not an owner affected or interested within the meaning of the Act.

Judgment of the Queen’s Bench Division, 24 O. R. 12, reversed.

Statement.

THIS was an appeal by the plaintiffs from the judgment of the Queen’s Bench Division, reported 24 O. R. 12.

The action was brought to restrain the defendant township from enforcing an award purporting to be made by the defendant Lewis as township engineer under the provisions of the Act respecting Ditches and Watercourses, R. S. O. ch. 220, and from constructing through the lands of the plaintiffs the drain therein mentioned. The facts are very fully stated in the report below, the legal question being the meaning to be given to the word “owner” as used in the Act. The plaintiffs contended that only actual owners had a voice in deciding as to the construction of a drain, while the defendants contended that the persons assessed as owners were entitled to decide, and this construction was adopted by FALCONBRIDGE, J., at the trial, and by the Queen’s Bench Division.

The plaintiffs’ appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 15th and 16th of March, 1894.

Moss, Q. C., and *MacTavish*, Q. C., for the appellants. The power to cause drains to be constructed, and thus adversely to create easements, can be exercised only by a majority of the actual owners of the lands affected, and there was not a majority of actual owners in favour of this scheme. An occupant of land, to whom the owner has promised to give or devise it, cannot be counted as an owner. No will or deed has been made, and title cannot be made by mere delivery of possession. The promise is

besides vague and indefinite, and incapable of enforcement. The assessment roll is not the proper test of ownership. The proceedings affect only the owners and are confined to them though when the proceedings are concluded the aid of the municipality may be invoked for such subsidiary purposes as are referred to in sections 9 and 18. The Legislature has drawn a distinction between owners, tenants and occupants, and has thus recognized the usual interests in land, and when it declared that the consent of a majority of the owners interested was necessary, it clearly referred to those having the fee in the lands. The statute must be construed strictly, and its provisions implicitly followed: *Hus v. School Commissioners*, 19 S. C. R. 477. *Leuris v. Arnold*, L. R. 10 Q. B. 245, is relied on by the Queen's Bench Division, but this case has been overruled by *Sale v. Phillips*, [1894] 1 Q. B. 349. And see *Regina v. Lee*, 4 Q. B. D. 75; *Regina v. Swindon Local Board*, 4 Q. B. D. 305; *Regina v. Vestry of St. Marylebone*, 20 Q. B. D. 415.

Judgment.

 OSLER,
J.A.

Shepley, Q. C., and *G. F. Henderson*, for the respondents. Owner means owner within the meaning of the Assessment Act which is *in pari materia* with this Act, and admittedly there was a majority of the assessed owners in favour of the work. The word has in itself no definite legal meaning and in dealing with an Act such as this is, admittedly passed in the interest of those who desire to cultivate land, it should be interpreted to mean the persons having the actual beneficial usufruct: *Miller v. Grand Trunk R. W. Co.*, 45 U. C. R. 222; *In re Roberts and Holland*, 5 P. R. 346; *Regina v. Swalwell*, 12 O. R. 391; *Hughes v. Sutherland*, 7 Q. B. D. 160; *Woodard v. Billericay Highway Board*, 11 Ch. D. 214; *Prescott Election Case*, Hodgins 1. Unless the Act be so construed the provisions for collecting the cost in the same way as taxes would be meaningless.

Moss, Q. C., in reply.

April 16th, 1894. The judgment of the Court was delivered by

Judgment. **OSLER, J. A. :—**

**OSLER,
J. A.**

The broad question is as to the jurisdiction of the engineer to make the award, and this depends upon whether the landowner, who filed with the clerk of the municipality the requisition for the construction of the drain, had first obtained the assent in writing thereto of (including himself) a majority of the owners affected by or interested in the proposed drain, as required by section 6 (a) of the Act.

Some steps had been taken by the plaintiff James York, Sr., and two other persons, as far back as October and December, 1888, with the object of having a drain constructed on some of the lands affected by the award in question, but no effective requisition had been filed under section 6 (a), or resolution passed by the council under section 6 (b) after notice to the parties interested. These proceedings were in my opinion, entirely abandoned, and cannot be regarded as forming any part of the foundation of the award, nor does the award profess to be based upon them, or upon anything but the owners' requisition bearing date the 25th August, 1891, filed with the clerk pursuant to the Act. As to this part of the case I agree with the opinion of the Court below.

The requisition was signed by six persons: Wm. McRostie, George Comrie, Hugh McAlindon, George Popham, James McCurdy and William Comrie. Other owners of lands affected were James York, Sr., John Carson, the municipality of the township of Osgoode, and Mrs. Peter McRostie. Two others, making twelve in all, were the plaintiffs James York, Jr., and Isaac York, but they have been rejected, and held not to be owners within the meaning of the Act, for the purpose of ascertaining whether the requisition was sufficiently signed.

The plaintiffs contend that they were owners, and ought to have been counted.

They also contend that George Comrie was not an owner and ought not to have been counted, and further that the

Court below were wrong in holding that the township of Osgoode were assenting parties to the requisition.

Judgment.

OSLER,
J. A.

That James York, Jr. and Isaac York, were owners in fee simple of part of the lands affected by the drain there can be no question, nor that they became such by conveyances thereof from their father, the plaintiff James York, Sr., made on the 17th December, 1890, and duly registered in the county registry office on the 3rd March, 1891. In their case no question arises as to what quantum of interest will constitute an owner within the meaning of the Act. They were owners not only when the award was made, but long before the proceedings on which it is based were initiated. The ground on which they have been held to be excluded from an owner's right to control or take part in such proceedings is, that the meaning to be ascribed to the term "owner" in the Act is "assessed owner," the person appearing by the assessment roll to be the owner, and that they were not assessed for the year 1891, but their father was, for the lands he had conveyed to them in the previous December. I am unable, with all deference, to subscribe to this limitation of the meaning of the term owner. It seems to me to savour more of legislation than of interpretation; the Act does not define the meaning of the term, nor has it adopted the limitation found in the drainage clauses of the Municipal Act, R. S. O. ch. 184, sec. 569, where the persons who may set the council in motion are the majority in number of the persons as shewn by the last revised assessment roll to be the owners, whether resident or non-resident, of the property to be benefitted. If the Legislature had meant that the persons to control or initiate the proceedings under the Ditches and Water-courses Act should be the persons who were assessed as owners, it would have been easy to say so, but as they were dealing with drains extending over a comparatively limited area where owners of the property affected were known to each other, or could readily be ascertained, it was probably thought unnecessary to give an arbitrary

Judgment.

OSLER,
J.A.

meaning to the word. Moreover, in the case of non-resident owners whose names do not happen to have been entered upon the assessment roll, the real owner must be discovered and dealt with as provided in section 19, and there seems no reason why in other cases proceedings which may result in establishing *in invitum* an easement over the land through which the drain passes, binding upon privies in estate as well as parties—*Kelly v. O'Grady*, 34 U. C. R. 562—should not be taken by or against the real owner of the land, whatever may be the extent of the interest sufficient to confer that status.

It does not appear to me that there is anything in section 9, sub-sec. 2, section 14 and section 18 of the Act, which are relied on by the Court below as compelling the interpretation they have placed upon the word, inconsistent with the view that ownership for the purposes of the Act is not controlled by the assessment roll, or which makes it difficult to carry out the provisions of those sections if the other view of the meaning of the term is adopted. Section 9 deals with the case of a contract for rock-cutting, given out by the engineer, instead of requiring each person benefited to do his share of the work. The engineer is to determine the sum to be paid by each of the persons benefited, which, unless forthwith paid, "shall be added to the collector's roll, * * and shall thereupon become a charge against the lands of the parties so liable."

Section 14 appears to provide for the case of payment by the municipality of the fees of the engineer, and of any fees or costs awarded or adjudged to any person; and provides that unless the same be forthwith repaid by the person awarded or adjudged to pay the same, the municipality shall place them on the collector's roll as a charge against the lands of such person, and they shall thereupon become a charge upon land and be collected as ordinary taxes.

Section 18 contains similar provisions with regard to fees and sums of money which may become payable in

respect of other works ordered by the engineer in connection with the drain. Judgment.

OSLER,
J.A.

None of these sections refer to the persons who are entered on the assessment roll in respect of the land. The persons liable to pay the sums of money and fees therein mentioned are evidently intended to be entered therefor *nomination* upon the collector's roll.

It is from them that such moneys are to be collected, and it is their lands which are charged in default of payment. Whether they are the assessed owners, or the real owners though not assessed, can make no difference; they have no reason to complain. It is the land which is ultimately charged in either case, and it has not been suggested how any complication or difficulty is likely to arise.

James York, Jr., therefore, and Isaac York, must be regarded as owners of lands affected, for the purpose of these proceedings.

The next question is, whether George Comrie was such an owner of the lot in respect of which he signed the requisition.

The Act, as I have said, contains no definition of the word "owner"; the meaning must, therefore, depend upon the subject matter and the context. Here, I think, when it is considered that proceedings taken under the Act may result in what has been described as the grant of an easement over the land, the word is intended to mean, at the lowest, a person who has a real and substantial interest in the land, possibly something less than the fee simple, but certainly more than that of a mere occupier or tenant at will. The owner may be bound by notices served upon the occupant as the 19th section provides, but there is nothing in the 6th section which enables the latter to confer jurisdiction upon the engineer by the initiatory requisition and assent. In such cases as *Lewis v. Arnold*, L. R. 10 Q. B. 245; *Woodard v. Billericay Highway Board*, 11 Ch. D. 214, we have illustrations of the extension of the term to embrace smaller interests in property, where the context and subject matter require it, as where the proceedings to be effective at

any character, and would and to the person in who be taken are intended permanent manner, and y sold for non-payment and whose ample means r to parties affected it f the owner of the fee person who may have here possessor or yearly of years. So on the ple that such a person placed on the collector's es incurred for making to the property of his

of which George Comrie ally was the property of at in fee, and although probably has a very well der will at some time or y dead or by will he at title to it than as tenant . *Jibb v. Jibb*, 24 Gr. App. Cas 467.

he cannot be held to be an Act.

if the municipality are road as owners of land not be treated as assent- which the engineer acted reference to it, and every the abandoned scheme, support the subsequent requisition must be held majority of the owners subsequent proceedings the Court below were of

I think that nothing has been done by the appellants to estop them from asserting that the engineer's proceedings were without jurisdiction. They have not permitted any of the work to be done upon their own land, and their opposition to the proceedings throughout has been sufficiently manifest. They are, I am of opinion, entitled to judgment, except as to damages, as prayed for in the statement of claim. There should be no costs against the defendant Lewis.

Judgment.

OSLER,
J.A.

I refer to the following cases : *Hunt v. Harris*, 19 C. B. N. S. 13; *Regina v. Lee*, 4 Q. B. D. 75; *Regina v. Swindon Local Board*, 4 Q. B. D. 305; *Regina v. Vestry of St. Marylebone*, 20 Q. B. D. 415; *Sale v. Phillips*, [1894] 1 Q. B. 349; *Hughes v. Sutherland*, 7 Q. B. D. 160; *Collinson v. Newcastle, etc. R. W. Co.*, 1 C. & K. 546; *Schott v. Harvey*, 105 Pa. St. 222; *Baltimore v. Boyd*, 64 Md. 10.

Appeal allowed with costs.

COVENTRY V. MCLEAN.

COVENTRY V. MCLEAN ET AL.

Landlord and Tenant—Lease—Forfeiture—Option to Purchase.

The Court will not make a declaration relieving against forfeiture of a lease for non-payment of rent when the trial of the action for that relief takes place after the term has expired by effluxion of time, even though the lease gives an option of purchase to be exercised during the term, which the lessee had attempted to exercise after the forfeiture.

A lessee is not entitled as of right to relief against forfeiture for non-payment of rent. That relief may be refused on collateral equitable grounds.

Coventry v. McLean, 22 O. R. 1, approved.
Judgment of BOYD, C., affirmed.

Statement.

THIS was an appeal by the plaintiff from the judgment of BOYD, C.

The first action, in which relief against re-entry for non-payment of rent was claimed, was commenced on the 1st of October, 1890, and was tried in the Autumn of 1891, when judgment was given in the plaintiff's favour, but a new trial was ordered by the Queen's Bench Division on the 1st of February, 1892, because of the rejection of evidence. See 22 O. R. 1.

The second action was brought on the 2nd of June, 1892, against the lessor and one King, a purchaser from the lessor, for specific performance of an agreement for sale of the demised premises.

The actions were tried together at Sandwich, on the 26th of October, 1892, before BOYD, C., who, on the 15th of February, 1893, dismissed them with costs.

The facts may be shortly stated. On the 17th of August, 1887, by an agreement bearing that date, the defendant McLean agreed to sell to the plaintiff a parcel of land in the village of Kingsville, containing fifteen acres, which was afterwards duly conveyed in pursuance of such agree-

ment, and she further agreed to execute a lease of another parcel of land known as Paradise Grove, in the same village, for five years at \$100 per annum, "with the option to purchase the said Grove at any time during the said term at the rate of \$300 per acre." Statement.

There was a clause declaring the lease to be an essential and binding part and parcel of the agreement.

On the 30th of September, 1887, a lease was executed in pursuance of the agreement, expressed to be made in pursuance of the Act respecting short forms of leases, and the defendant McLean thereby demised Paradise Grove, described as Block H, Plan 313, to the plaintiff for the term of five years, to be computed from the 1st of September, 1887, at the yearly rent of \$100, payable on the 1st of September in each and every year during the term; the first payment to be made on the 1st of September, 1888. There was a proviso for re-entry by the lessor on non-payment of rent, whether lawfully demanded or not, and it was "further understood and agreed between the parties that the party of the second part (the plaintiff) should have the option and privilege of purchasing the aforesaid block H, containing by admeasurement $8\frac{1}{2}$ acres, at any time during the continuance of the term hereby demised at and for the price or sum of \$300 per acre."

The lessee paid, and the lessor accepted, the year's rent due on the 1st of September, 1888, and 1889, although in the latter year it was paid somewhat after the gale day. In 1890 the gale day again passed without payment being made, and this delay the plaintiff explained by saying that he was under the impression that the date of the lease, viz., 30th September, was the day for payment of the rent. On or about the 20th September, 1890, the lessor re-entered upon the demised premises with the intention and for the purpose of exercising her right of re-entry and of avoiding the lease and forfeiting the term by reason of the lessee's default, and she thereafter refused and continued to refuse to accept payment of the rent and insisted that the term was at an end. On the 1st of October, 1890, having tendered the

Statement.

rent, the plaintiff issued the writ in the first action for relief from the forfeiture, but it was not served until the 6th of April, 1891, and the judgment which he obtained at the first trial in the Autumn of 1891 was set aside and a new trial directed. Subsequently, the plaintiff, on the 2nd of June, 1892, brought the second action for specific performance of the agreement to sell Paradise Grove. The notice of his intention to exercise the option to purchase was not given until after the commencement of the action, viz., on the 6th of June, 1892. The defendant resisted specific performance on the ground that the option to purchase had not been exercised during the currency of the term which had been forfeited and was at an end when the second action was brought, and on the further ground that the plaintiff had failed to carry out certain representations alleged to have been made by him as to his intention to build a hotel on the fifteen acre parcel which had been conveyed to him, which representations formed a material inducement to the defendant in making the lease and giving the option of purchase, as the contemplated improvements would add very much to the value of her remaining property. The learned Chancellor found that these representations were proved and dismissed the action for specific performance on that ground, and the other action on the same ground, and on the further ground that the term of the lease had then expired by effluxion of time, and therefore that, even if it was set up again as from the date of the forfeiture, no effectual relief would thereby be given to the plaintiff, as he was not entitled to enforce his option to purchase, assuming that he could validly have declared such option while the term was non-existent by reason of the forfeiture.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 30th March, and 2nd of April, 1894.

W. Nesbitt, and *A. Monro Grier*, for the appellant. The plaintiff is entitled as of right to relief against the re-

entry for non-payment of rent, and this relief cannot be refused on collateral equitable grounds. The evidence of the alleged representations was improperly admitted, and the judgment of the Queen's Bench Division, 22 O. R. 1, on this point was wrong. Here there was a *bonâ fide* mistake, caused by the date of the lease, and relief should be given as of the date of the tender: *Bowser v. Colby*, 1 Ha. 109; *Slo-man v. Walter*, 2 W. & T. L. C., 6th ed., at p. 1263; *Feret. v. Hill*, 15 C. B. 207. The time of the application to the Court governs and not the time of the trial: *Croft v. London and County Banking Co.*, 14 Q. B. D. 347. Whether there is a declaration of relief or not the plaintiff is entitled to enforce the option. It is independent of the lease and may be exercised at any time during the time for which the lease was granted: *Green v. Low*, 22 Beav. 625. The words do not refer to a conditional and possibly abridged term. Conversely the principle of *St. John v. Rykert*, 10 S. C. R. 278, applies.

Cassels, Q. C., for the respondents. The authorities cited by the Queen's Bench Division abundantly support the proposition that the claim for relief may be met on equitable grounds, and the misrepresentations of the plaintiff are fatal. Apart from this, looking at the case in the narrow way contended for by the plaintiff, there is nothing to justify relief. The forfeiture was not the result of mistake, but of negligence: *Barrow v. Isaacs*, [1891] 1 Q. B. 417; *Lamare v. Dixon*, L. R. 6 H. L. 416; *Mara v. Fitzgerald*, 19 Gr. 52. It is too late to relieve after the term has expired by effluxion of time, and too late to exercise the option when the lease upon which it is dependent is at an end.

W. Nesbitt, in reply.

April 16th, 1894. The judgment of the Court was delivered by

OSLER, J. A. :—

[The learned Judge stated the facts as above set out and continued :]

Judgment.

OSLER,
J.A.

The plaintiff contended that as regards the first action, he was entitled as of right to a decree relieving him from the forfeiture for non-payment of the rent, independently of any other considerations, the proviso for re-entry being looked upon as a mere security for the rent; but I am of opinion that this is not the law, the proviso in the statute R. S. O. ch. 143, sec. 22 being that "if the lessee obtains equitable relief, he shall hold and enjoy the demised lands according to the lease thereof made without any new lease." In *Berney v. Moore*, 2 Ridg. P. C. 310—a case upon the Irish Statute 11 Anne ch. 2, similar to 9 Geo. I. ch. 28, of which our statute is a re-enactment, and which contained a section expressed in almost the very words quoted above—the Judges to whom the question was submitted were unanimously of opinion that the statutes which gave the remedy by ejectment for non-payment of rent, were not "mandatory on a Court of Equity to set up an immediate lease;" but the Court was left at full liberty to exercise its judgment and discretion upon the merits and circumstances of each particular case. And of the same opinion evidently was the Court of Appeal, in the recent case, cited by the Chancellor, of *Stanhope v. Haworth*, 3 Times L. R. 34. See also *Bowser v. Colby*, 1 Ha. 109, at p. 138.

Whether, in order to give the tenant the benefit of some collateral agreement, such as an option to purchase to be exercised during the currency of the term, the Court would relieve against a re-entry and consequent forfeiture of the term where it had expired by effluxion of time at the trial, and where consequently the lessee could no longer "have, hold, and enjoy the demised lands according to the lease thereof made," may be doubted. In all the cases I have examined, there was a considerable unexpired residue of the term in respect of which substantial relief could be given. In *Gerahty v. Malone*, 1 H. L. C. 81, the original decree was made during the term, which had, however, expired before the case arrived at the House of Lords, where the objection was taken but was disregarded, the House being concerned only with the decree which was before them. The advantage which the tenant got in that

case was the preservation of the covenant for renewal of the lease for another long term, so that it forms no real exception to the rule.

Judgment.

OSLER,
J.A.

Then it was said that the lease was not important, and that it was sufficient that the option should be exercised within five years, but it seems to me clear, whether we look at the agreement of the 17th September, or at the stipulation in the lease itself, that the proper construction to be placed on the language of the clause by which the option is given, is that it was to be exercised during the currency of the term demised and not merely during a period of five years whether the term continued to exist or no. The case of *Green v. Low*, 22 Beav. 625, is quite distinguishable, for there by the terms of the agreement the right to the lease and the right to purchase were independent of each other; the non-observance of the condition deprived the plaintiff of his right in the former, but the right to purchase within the time limited was unaffected by this. See Dart's *Law of Vendors and Purchasers*, 6th ed., p. 240, (n.) That the terms attached to the exercise of such an option as this are strictly construed, and that all precedent conditions must be fulfilled before any contract binding on the vendor can arise, is well settled. "If the lessee chooses to comply with the conditions, the lessor is bound. It is, in fact, a conditional offer by the lessor, and the condition must be performed before the offer becomes binding. It is a mistake to apply to a stipulation of this kind the rules which are applicable to ordinary contracts for the sale of real estate": *per* the Lord Chancellor in *Western v. Collins*, 11 Jur. N. S. 190. And see *Nevitt v. McMurray*, 14 A. R. 126; *Riddell v. Durnford*, [1893] W. N. 20.

It would, therefore, be useless to relieve against the forfeiture so far as the plaintiff's tenant right is concerned, because that had expired by lapse of time before the trial of the action; and even if relief could be granted we are to set up the term for some collateral purpose, as for example, to place the tenant in a position to say that he had exer-

Judgment.

OSLER,
J.A.

cised his option to purchase during the term, yet that ought not to be done if the facts shewed that the landlord had a reasonable ground for resisting specific performance. Looking at the case from this point of view I am of opinion after a careful examination of the evidence, that the learned Chancellor's discretion in refusing specific performance was properly exercised. I think the evidence shews that the plaintiff did distinctly represent that his intention was to build a summer hotel on the property purchased by him from the defendant, and that this representation materially influenced the defendant in granting the lease and option to purchase the other property. This representation the plaintiff made no attempt to carry out, and the cases of *Myers v. Watson*, 1 Sim. N. S. 523, and *Lamare v. Dixon*, L. R. 6 H. L. 416, are authority for holding that under such circumstances specific performance may well be refused, even though the representation formed no part of the agreement, and though it may itself have been of such a character as to be incapable of being legally enforced. I cannot agree that the acceptance by the defendant of rent accruing due under the lease after the time when the representation ought to have been performed, or begun to be performed, is any waiver of the defendant's right to resist specific performance on this ground. The lease as a completed instrument stood by itself, and it does not lie in the plaintiff's mouth to say that if the defendant intended to rely upon the non-performance of the representation she might have re-entered for non-payment of the rent in September, 1889.

I agree with the Chancellor's findings of fact, and would therefore dismiss the appeals.*

Appeals dismissed with costs.

* As to relief from forfeiture, see *Taylor v. Knight*, Viner's Abr. Chancery (y.), para. 31, p. 406; *Hill v. Barclay*, 18 Ves. 56; 2 Platt on Leases, p. 475; Comyn on Landlord and Tenant, 2nd ed., p. 565; *Doe v. Lewis*, 1 Burr. at p. 619; *Reynolds v. Pitt*, 2 Pri. 212 (n); *Croft v. London and County Banking Co.*, 14 Q. B. D. 347; *Hare v. Elms*, [1893] 1 Q. B. 604; *Barrow v. Isaacs*, [1891] 1 Q. B. 417, 425.

NASON V. ARMSTRONG ET AL.

McCLELLAND V. ARMSTRONG ET AL.

WRIGHT V. ARMSTRONG ET AL.

Vendor and Purchaser—Sale of Land—Conditions of Sale—Title—Objection—Time—Will—Defeasible Estate.

An agreement for the sale of land contained the condition that "the vendee is to examine the title at his own expense, and to have ten days from the date hereof for that purpose, and shall be deemed to have waived all objections to title not raised within that time":—

Held, per HAGARTY, C. J. O., and OSLER, J. A. This condition did not, even in the absence of objection within the time limited, compel the vendee to accept a defective title.

Per BURTON, and MACLENNAN, JJ. A. The condition was sufficiently wide to bind the vendee, in the absence of objection within the limited time, to accept such title as the vendor might be able to give.

A devise to two persons of separate lots of land with a proviso that if either devisee should die without lawful issue the part and portion of the deceased should revert to the surviving devisee, and with the further proviso that in case both devisees should die without issue the devised lands should be divided by certain named persons as they should deem right and equitable among the relatives of the testatrix, confers upon each devisee only a defeasible fee simple.

Judgment of STREET, J., 22 O. R. 542, affirmed.

THESE were appeals by the defendants from judgments of STREET, J. Statement.

His judgment in the first action is reported 22 O. R. 542, and in the other two actions the questions for decision were almost the same. The actions were brought by purchasers asking specific performance of agreements for sale, and in the alternative for re-payment of moneys paid on account of purchase money if it should be found that the vendors could not make a good title.

The defendants' title depended upon the construction of the will of one Anne Peterson, and the material portions of that will are printed *in extenso* in the report below. The testatrix devised to each of her daughters, Anne Peterson and Bridget Peterson, a parcel of land with a proviso that if either devisee should die without lawful issue, the part and portion of the deceased should revert to the surviving devisee, and with the further proviso that in case both

Statement. devisees should die without issue the devised lands should be divided by certain named persons as they should deem right and equitable among the relatives of the testatrix. Bridget Peterson, on the 17th of June, 1879, after her marriage to one Sherwood and the birth of issue, conveyed her portion in fee to one Callender, a predecessor in title of the defendants.

The agreement for sale in question in each of the actions provided for payment in quarterly instalments, and contained the following provisions :—

“ The vendors agree to convey the said lot, by a good and sufficient deed containing the usual statutory covenants, to the said vendee when half the purchase money with interest aforesaid is fully paid, and to take a first mortgage upon the said lot for the balance bearing interest payable quarterly at seven per cent. per annum. * * The vendee agrees to pay taxes from date. The vendee to examine the title at his own expense, and to have ten days from the date hereof for that purpose, and shall be deemed to have waived all objections to title not raised within that time, and should any valid objection to the title be raised that the said vendors cannot or are unwilling to remove they shall cancel this agreement and return the money paid. The vendors not to furnish abstract of title, title deeds or copies thereof, or any evidence of title other than those in their own possession. And it is expressly understood that time is to be considered the essence of this agreement, and if at any time any payment of principal or interest is in arrears for two months these presents shall become null and void and of no effect, and the said vendors shall be at liberty to take possession of and re-sell the said land.”

In the Nason case the following requisition, among others, was made on the 29th of March, 1889, within the ten days allowed :—

“ Required evidence that the Bridget Sherwood who conveyed to Henry Callender by instruments, Nos. 10552, and 11717, both dated 17th June, 1879, is the same person as Bridget Peterson a devisee under will of Anne Peterson,

No. 13641 G. R., and that she has had lawful issue prior to 17th June, 1879.” Statement.

The defendants at first refused to furnish any evidence in answer to the objections, and offered to cancel the agreement.

Subsequently a declaration covering these points was furnished, and the purchaser made several of the quarterly payments without raising the objection that the defendants did not take a good title under Anne Peterson's will.

In the McClelland case no requisitions were made, and in this case also several payments were made.

In the Wright case the following requisitions were made within the time limited:—

“Will of Anne Peterson. Required evidence that Bridget Peterson did not die without issue; that she had power to convey free from the limitations in the devise or bequest to her in her mother's will.

Grant 17th June, 1879, Bridget Sherwood and Ann Sherwood to Henry Callender. Required evidence of the identity of Bridget Sherwood, and evidence that she had power to make this conveyance.”

Argumentative answers were made to these requisitions, and the objections were not pressed further at the time, several payments being made in this case also, and the purchaser made attempts to re-sell.

It was admitted that when the agreements were made the defendants had no knowledge of the possible defect in title.

The actions were tried in September, 1892, before STREET, J. Both devisees were then living, and both had issue then living. The learned Judge subsequently gave judgment in each case in favour of the plaintiff, without costs, and these appeals were thereupon brought and were argued together before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 22nd and 23rd of May, 1893.

Argument.

Moss, Q. C., and *J. A. Macdonald*, for the appellants. *Little v. Billings*, 17 Gr. 353, has not been successfully distinguished, and governs this case. The devise confers an estate tail with at most a conditional limitation, and the conveyance by the devisee passes a title in fee: *Fearne on Contingent Remainders*, p. 424; *Driver v. Edgar*, 1 Cowp. 379; *Jones v. Ryan*, [1846] 9 Ir. Eq. 249; *Fetherston v. Fetherston*, 3 Cl. & F. 67. But if the interest is contingent and defeasible the objection cannot now be raised. *Want v. Stallibrass*, L. R. 8 Exch. 175, is distinguishable, for there there was no title at all. This is also the ground of decision in *Denison v. Fuller*, 10 Gr. 498, and *Saxby v. Thomas*, 63 L. T. N. S. 695. Here at worst there was a good title during Bridget Peterson's life, so that the condition in the agreement is a bar: *McManus v. Little*, 3 Ch. Ch. 263; *Imperial Bank v. Metcalfe*, 11 O. R. 467; *Burnell v. Brown*, 1 J. & W. 168; *Fordyce v. Ford*, 4 Br. C. C. 495. The purchasers, after the defect was known to them, made payments and dealt with the lands and have lost the right to now object: *Margravine of Anspach v. Noel*, 1 Madd. 310; *In re Gloag and Miller's Contract*, 23 Ch. D. 320; *Dart's Law of Vendors and Purchasers*, 6th ed., pp. 495, 498; *Pegg v. Wisden*, 16 Beav. 239; *Sweet v. Meredith*, 8 Jur. N. S. 637; *Sibbald v. Lowrie*, 18 Jur. 141.

Armour, Q. C., and *G. Y. Smith*, for the respondent Nason. There cannot be waiver of actual want of title but only of the right to proof of title, and it is only as to proof that a condition of the kind here in question is directed. The vendors were in default all along for they did not answer the objection or give the information asked for, which would have enabled the purchaser to decide as to the sufficiency of the title. *Want v. Stallibrass*, L. R. 8 Exch. 175, has not been successfully distinguished. There the vendor delivered an abstract which was incomplete on its face. Here the purchaser was not entitled to an abstract, but the vendors were bound to give him such information as was obtainable by them, and not

having done this were brought into the same position as if Argument.
an incomplete abstract had been delivered. *Denison v. Fuller*. 10 Gr. 498, draws the distinction between want of title and defect in title. Making the payments was a compliance with the terms of the contract, and up to the time of the conveyance the objection was open to the purchaser: *Nash v. Wooderson*, 33 W. R. 301; 52 L. T. N. S. 49; *Darby v. Greenlees*, 11 Gr. 351. That there is want of title is clear. Failure of issue in the lifetime of the devisee is contemplated: *Smith v. Osborne*, 6 H. L. C., at p. 393; *King v. Frost*, 15 App. Cas. at p. 553; *Ashbridge v. Ashbridge*, 22 O. R. 146. There is no estate tail here by implication, because the words "dying without issue" are qualified in such a way as to shew that not an indefinite failure of issue but a failure in the lifetime of the devisee is intended. The provision as to division of the estate is strong evidence of this. The cases cited refer to an estate tail by restriction, when admittedly a conditional limitation may be barred.

Marsh, Q. C., and *G. Y. Smith*, for the respondent McClelland, argued on the same lines, and cited on the construction of the will: 2 Jarman, 4th ed., p. 330; *In re Rye's Settlement*, 10 Ha. 106; *Gee v. Corporation of Manchester*, 17 Q. B. 737; and as to the effect of the condition: *Brown v. Pears*, 12 P. R. 396; *Warren v. Richardson*, Younge 1; *Harnett v. Baker*, L. R. 20 Eq. 50; *Waddell v. Wolfe*, L. R. 9 Q. B. at p. 521; *In re Cox and Way's Contract*, [1891] 2 Ch. 109.

Marsh, Q. C., and *G. G. S. Lindsey*, for the respondent Wright, adopted the arguments advanced on behalf of the other respondents, and contended in addition that Wright should have his costs, having taken the objection in time.

Moss, Q. C., in reply.

On the 14th of November, 1893, the Court intimated that argument was desired as to the effect of ignorance of the defect, and this point was argued on the 8th of March, 1894, by the same counsel, the following cases being cited:

Argument. *Jones v. Clifford*, 3 Ch. D. 779; *Soper v. Arnold*, 37 Ch. D. 96; *Bettyes v. Maynard*, 46 L. T. N. S. 766; *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223; *In re Bryant and Barnningham's Contract*, 44 Ch. D. 218; *Paget v. Marshall*, 28 Ch. D. 255.

April 16th, 1894. HAGARTY, C. J. O:—

I am of opinion that my learned brother Street has rightly construed the will in this case in holding that Bridget Peterson, the devisee, took a fee simple in the lands to be divested in the happening of the event of dying without lawful issue, and the estate thus vesting in her sister if surviving. This provision, and that which enables her executors and other persons named to sub-divide the estate in the event of both sisters dying without issue, seem to me clearly to rebut any pretension to her taking an estate tail, which could enlarge her conveyance to Callender.

I do not think there is anything in the conditions of sale to compel the vendees to accept a title which they discover to be under the will clearly defective. Vendees may, I presume, contract themselves out of all right to any title beyond what the vendors actually may possess, but they have not done so here.

The price was \$720; \$40 down, balance in quarterly payments of \$25 each, with interest, and when half the consideration was thus paid the vendors were to convey by good and sufficient deed with usual statutory covenants, and to take a first mortgage for balance.

The plaintiff, Nason, continued to make his quarterly payments down to April, 1891, and in June, 1891, expressed his readiness to pay all the residue, requiring a good title. The alleged defect was then fully known. He then commenced this suit. I need not detail the long correspondence.

North, J., in *Nash v. Wooderson*, 52 L. T. N. S. at p. 51, says: "If the vendor said I am owner in fee of the property,

and then added a condition, the purchaser shall accept my title, and shall not go behind the conveyance from me to him, or ask any question, or make any requisition whatever, it appears to me that he would be precluded from making those objections if that statement was true; but that if the statement which accompanied the condition was in itself an untrue statement, then he would not be bound by the conditions at all, and he would have a right to say, "Although taking you at your word, taking your statement of title, I may not ask questions, yet if it turns out that that statement upon the faith of which I was content not to ask questions, is an untrue and an incorrect statement, I am not bound any longer by the condition not to ask questions."

Judgment.
HAGARTY,
C.J.O.

Jones v. Clifford, 3 Ch. D. 779, before Hall, V.C., seems, I think, fully to recognize the same general principle on a review of the cases.

In Sugden on Vendors, 14th ed., p. 337, it is stated that the right to a good title is a right not growing out of the agreement between the parties, but is given by the law.

This is emphatically repeated and noticed in *Want v. Stallibrass*, L. R. 8 Exch. 175, cited by my learned brother Street.

In Dart's Law of Vendors and Purchasers, 6th ed., p. 180, it is said that a condition restrictive as to the time within which the purchaser's requisitions are to be made, cannot be relied on, where there are grave objections to the title which are not discoverable on the face of the abstract.

Some strong expressions of Kindersley, V. C., in *Warde v. Dickson*, 5 Jur. N. S. at p. 700, are referred to as to conditions limiting time for objection not preventing a purchaser from objecting that there is no title or a defective title.

It seems that the agreement was based upon the vendors' asserted ability to make the ordinary title in fee simple.

It may be said that this was literally a seisin in fee but liable to be wholly divested on a particular event.

Judgment. Such a title would be as illusory as it would be unmarketable.

HAGARTY,
C.J.O.

I understand that the properties were and are unproductive, so that no account of rents and profits would be necessary.

As to the return of the purchase money :—I do not think that the case derives any benefit from the principles laid down in the very peculiar case of *Soper v. Arnold*, 37 Ch. D. 96.

The vendors cannot give a good title, and the plaintiff requires re-payment of his purchase money.

I think he is entitled to a decree therefor, but as the learned trial Judge held, without costs. There was much dilatoriness, omission and delay in raising and settling the question of title.

It may be some excuse for purchasers on these extended terms of credit, postponing the final execution of the deed conveying the estate, that they delayed so long, possibly relying on the vendors' ultimately removing all difficulties and objections to the title.

I think the result must be the same in the other two cases of *McClelland v. Armstrong* and *Wright v. Armstrong*.

OSLER, J. A. :—

I agree.

BURTON, J. A. :—

I agree with the other members of the Court as to the construction of the will of Anne Peterson, and that the judgment of the Court below upon that point should be affirmed.

Upon the other point, as to the right of the plaintiff to recover back the purchase money paid from time to time, by reason of a defect, as is now alleged, in the title to the property agreed to be sold, I am of opinion that the plaintiff is now debarred by the special terms of the contract from raising the objection.

I concur to the fullest extent in the view that where a party offers an estate for sale without qualification it amounts to an assertion that he is seized of an absolute estate in fee simple, and he undertakes in the absence of express stipulation to convey that estate. I also agree that the purchaser's right to a good title does not arise out of the agreement, but is a right given by the law.

Judgment.

BURTON,
J.A.

Where therefore there is a mere agreement by the one party to sell and the other to purchase, with no conditions, it is the purchaser's right to have a good title made out for him by the vendor, and it is his right to have that question sifted to the bottom.

In cases of that kind the ordinary rule is for the vendor to produce an abstract of title, and the purchaser is entitled to make *objections to or requisitions thereon*, and until a full and perfect abstract is furnished, the vendee may object or require further information. If it should appear upon such an abstract that it was absolutely out of the power of the vendor to make a title, the purchaser might at once rescind; for in such a case, notwithstanding that the purchaser had omitted to make a requisition within the prescribed period, it would seem that if he could shew by any means in his own power that the vendor had no title, he might do so, and he would not be bound to accept a title wholly bad, when the very basis of the contract, apart from the conditions of sale, was that the vendor was bound to give a good title.

No doubt the parties may, by their conditions, waive even this, and the question is whether under this particular contract they have not done so.

As said by Blackburn, J., in *Waddell v. Wolfe*, L. R. 9 Q. B. at p. 521, a distinction appears to be clearly made in this contract between objections to the title and requisitions on title.

The purchaser is to examine the title at his own expense, and to have ten days from the date of the contract for that purpose.

The vendors were not bound to furnish an abstract of

Judgment.

BURTON,
J.A.

title, nor any title deeds or copies, nor any evidences of title other than those in their own possession.

If no objection was raised to the title within the ten days, the vendee was to be deemed to have waived all objections to title not so raised, but should any valid objection be raised which the vendors were unable or unwilling to remove, they were at liberty to cancel the contract and return the money paid.

In this case, although the time limited was short, the fullest liberty was apparently given to the purchaser to make requisitions upon the title, which the vendors were bound either to answer, or, if unable to do so, to return the money paid. Requisitions were made, but none of them touching the point now in question, and it is not clear whether it was present to the mind of the plaintiff, and he decided not to raise it, or was overlooked, but, however that may be, it was not raised, and the vendors declined to make any further answers to the requisitions, and subsequently offered to return the money paid and cancel the agreement.

I do not at all question the right of the purchaser here to have taken the objection at the proper time that the vendors could not make a good title by reason of the objections now raised but by not taking it at the proper time, I am of opinion that upon the true construction of this agreement he is precluded now from insisting on it, and is bound to accept such title as the defendants had, which is at least good during the life of Bridget and will most probably become an indefeasible title.

I think we should be making a new contract for the parties were we to hold that the plaintiff could still object to the defendants' title.

I do not think that the decision in *Want v. Stallibrass*, L. R. 8 Exch. 175, at all conflicts with this view. It proceeded apparently upon the ground that within the meaning of the conditions as properly construed there had been no default on the part of the purchaser. There was no stipulation on which the vendor could rely giving him a

right to retain the deposit, and the contract went off without any default of the purchaser, but of the vendor who had not a good title, and therefore the purchaser was entitled to claim back the deposit.

Judgment.

BURTON,
J.A.

Some expressions of Mr. Justice North in the case of *Nash v. Wooderson*, 33 W. R. 301, 52 L. T. N. S. 49, have been relied on, but I do not see how the case itself or the *dicta* in it, can affect the question we are considering, the construction and effect of a special contract. That is the case of a contract completed by conveyance, which could only be set aside, as I read the cases, on the ground of actual fraud, and as I understand the decision the learned Judge found actual fraud on the part of the vendor by making a representation which he knew to be untrue, and the contract contained a stipulation framed apparently with the view of concealing the facts and preventing any investigation into them.

If not, then I think, with great deference, that that decision is in direct conflict with a long course of decisions, of which I need only refer to *Brownlie v. Campbell*, 5 App. Cas. 925.

Here there was no statement made by the vendors beyond what is implied in law, and the purchaser was given the fullest opportunity of satisfying himself upon the point, but was told that unless he raised the objection within a certain time, he would be deemed to have waived it.

I think we should be frittering away contracts of this kind, which a very long experience has shewn to be very beneficial, and which parties dealing in the purchase of real property have come to regard as settled law upon which they could safely rely, and any departure from which would render it difficult if not impossible for solicitor or counsel to advise with any confidence, were we to allow this objection to be now taken; and I am, therefore, of opinion that the plaintiff's action to recover back the purchase money paid fails, and that the appeal should be allowed.

The same result follows in *McClelland v. Armstrong*.

Judgment.

BURTON,
J.A.

Not without some hesitation I have come to the conclusion that in *Wright's* case the objection was taken in time, though in a somewhat informal way, and that there has been no waiver; the appeal, therefore, in that case, should be dismissed.

MACLENNAN, J. A. :—

NASON V. ARMSTRONG.

The first question on this appeal is whether the defendants have a good title, and that depends on the construction of the will of Anne Peterson, dated the 29th September, 1863. The testatrix gave one parcel to her daughter Anne in fee, and another parcel, including the land now in question, to her daughter Bridget, also in fee. She then directed that if either of her daughters should die without issue her part should revert to the surviving daughter, and if both died without issue she authorized her executors and the pastor of St. Paul's church, and her brother, Michael Murnan, to sub-divide the estate, or the proceeds of the estate, amongst her relatives, "as those gentlemen whom I have appointed for that purpose may deem right and equitable in their prudence, justice and charity." The question is whether, under this devise, Bridget's estate in fee was cut down to an estate tail, or whether the estate in fee remained, subject to an executory devise over in the event of her having no issue living at her death; whether the death without issue referred to an indefinite failure of issue or failure at the time of her own death. The rule of construction is that the words "die without issue" import an indefinite failure, whether the subject be real or personal estate, but that in regard to either, they will yield to a clear manifestation of intention in the context to use them in the restricted sense of issue living at the death. It seems that the words yield more readily to such an intention in the context in the case of personalty than of realty, but that is the only

difference. There is a long series of cases, beginning with *Hughes v. Sayer*, 1 P. Wms. 534, and *Massey v. Hudson*, 2 Mer. 130, collected in 1 Jarman, 5th ed., p. 336, which decide that in bequests of personalty a gift over to a survivor, without any words of limitation such as we have here, manifests an intention that the failure of issue meant failure at death. On the other hand, there is a case of *Chadock v. Cowley*, Cro. Jac. 695, which is cited as good law in Fearn on Contingent Remainders, pp. 243-4, and also in the treatises of Jarman, Hawkins and Theobald, which is a decision exactly the other way in a case of real estate.

Judgment.

MACLENNAN
J.A.

The gift was of one parcel to testator's wife for life, remainder to his son Thomas in fee; and another parcel was given to his son Francis in fee. The will then went on: "I will that the survivor of them shall be heir to the other, if either of them die without issue." It was held by all the Court that it was an estate tail. It was said that if it had been "if he died without issue in the life of the other," or "before such an age," that then it should remain to the other; it might have been a contingent devise in tail, but being "that the survivor shall be heir to the other if he die without issue," that is an absolute estate tail immediately, and the remainder limited over.

This case was cited and relied on by Mr. Cairns in his argument in *Greenwood v. Verdon*, 1 K. & J. 74, and so far as it goes it is identical with the present case, for to say that the survivor shall be heir to the other if either die without issue is the same as to say, if either die without issue the part of the deceased shall revert to the surviving daughter.

But we have here a context that was not contained in that devise, and what we have to do is to apply the general principle and say whether it manifests an intention to restrict the meaning of the words to a failure at death.

In *Re Chisholm*, 17 Gr. 403, Mowat, V. C., held that a context which directed that in the event of death without issue of the devisee the land should be sold by the executors and that from the avails of the sale, and from such

Judgment. other of the testator's property as might then be remaining
MACLENNAN, in their hands, legacies should be paid to four named persons,
J. A. and the remainder applied in the discretion of the executors to missionary purposes, manifested an intention to restrict the meaning of the words "dying without issue" to a failure of issue at the death. He rested his decision on the personal trust given to the executors to sell the land, and in certain events, to apply the proceeds to missionary purposes, a trust which was personal and not transmissible, and also upon the circumstance that the legacies were to be paid not only from the proceeds of the sales, but from such other property as might be in their hands.

That case was carried to this Court and was affirmed, 18 Gr. 467, and Draper, C. J., delivering the judgment of the Court, and after discussing the authorities, says he thinks it more consistent with the whole tenor of the will, and having regard to the fact that the legacies given by him out of the proceeds of the sale directed to be made by the executors, the payment of which the testator could not have meant should await an indefinite failure of issue, to hold that the granddaughter took a fee simple subject to the executory devise. The Court found evidence in the context that the testator intended that the provisions of the gift over were to be performed not after an indefinite failure of issue, but during a life or lives in being, and so they gave the words the restricted meaning. I think we find the same kind of evidence here. There is here a personal trust. It is not confined to the executors, but two other persons are associated with them: the pastor of St. Paul's Church and Michael Murnan. They are to divide the estate, or they may sell it and divide the proceeds, among the relatives of the testatrix as they may deem right and equitable in their prudence, justice and charity. And the testatrix takes care to say that she has appointed those gentlemen for that very purpose. Now this trust is not transmissible, nor could it be exercised by survivors or survivor. The estate was not devised to them; they have merely a power of partition or sale with the authority to

divide the proceeds : Lewin's Law of Trusts, 8th ed., p. 611 ; Sugden on Powers, 8th ed., pp. 128, 129. Therefore the testatrix contemplated this part of her will to be executed in the lifetime of the persons named, and not at a remote and indefinite future time, and must have intended the failure of issue to be a failure of issue at the time of death.

Judgment.
MACLENNAN,
J.A.

I think, therefore, that we ought to affirm the judgment appealed from on the point that the title of the defendants is defeasible on the death of Bridget Peterson, now Sherwood, without issue living at her death.

The further question is whether the plaintiff is entitled to rescind the contract and to recover back the purchase money which he has paid, or whether he must accept a bad title and pay the balance.

The land is a vacant building lot and the plaintiff has never taken possession. He has never expressly accepted the title, or manifested an intention to take a bad or imperfect title. He went on paying his instalments of purchase money, and there was correspondence about various questions of title down to the commencement of the action ; but it was only at the last moment that the defect now insisted on was raised. Indeed it is not apparent that the plaintiff became aware of the full force of the objection until after the action was commenced.

The defendants contend that the plaintiff has waived all objections to the title by his conduct, and if not that he is precluded from raising it by the terms of the contract.

I agree with the learned Judge in his conclusion that there is nothing in the first contention, and that the only real difficulty in the plaintiff's way is the second contention that the objection is no longer open by reason of the terms of the contract.

The contract is dated the 22nd of March, 1889, and the price is \$720, of which \$40 was paid down, and the remainder was to be paid in quarterly instalments of \$25 each, with interest ; the first instalment to be paid on the 1st of July, 1889. Conveyance was to be made by a good and sufficient deed, when half the purchase money was paid,

Judgment. and a mortgage was then to be given for the balance. The
MACLENNAN, time for conveyance would therefore be on the 1st
J. A. October, 1892. The agreement then contained the following stipulations: (reading them).

It does not appear in evidence what if any abstract of title, title deeds or copies thereof, or evidences of title the vendors furnished to the plaintiff, but on the 29th of March the plaintiff served the defendants with requisitions. These were eight in number, and the fourth was as follows (reading it).

This requisition seems to shew that at that time the plaintiff had seen and perused the will of Anne Peterson, and that his attention had been called to the terms of the devise to her daughter Bridget. I think one must assume that he had seen either the will itself or the copy at full length in the registry office, for he refers to it by its number in the general register. That is the time, therefore, when we should have expected the plaintiff to raise the objection which the will discloses, having regard to the terms of the contract, but he did not do so, and the question is whether not having done so then or within the ten days from its date he was precluded by the contract from raising it at any time afterwards.

It is evident from the terms of the fourth requisition that when it was prepared the objection that is now made did not occur to the plaintiff. His notion appears to have been that if Bridget had issue born before she conveyed to Callender the title was good. To make it good it was necessary not only that Bridget should have had issue but that she should have died leaving issue surviving her. I think, too, that the proper inference from the whole case is that the plaintiff continued to be unaware of the force of the objection until shortly before the commencement of the action. He continued to pay his instalments, and was urgent about other points connected with the title, but the present objection was never mentioned. I think, too, that the same is true of the defendants. They thought that Bridget's title was an estate tail, and that the conveyance

to Callender had barred the entail and the estates in remainder. The point was not raised on the pleadings. At the opening of the trial, Mr. Moss, the defendants' counsel, contended that the question of title was not to be gone into, but should be investigated in the usual way, that is by a reference. It was, however, agreed to be tried as being a neat point of law, and it was contended then as it was before us that it was an estate tail.

Judgment.

MAOLENNAN,
J. A.

The case then is that until shortly before the trial the objection was not thought of by either party, and that even then the vendors insisted, and still insist, that it was untenable. We decide after argument that the objection is good, and we are now to determine whether by force of the contract it was waived.

The contract says that the plaintiff is to examine the title at his own expense. It is the defendants' title that is to be examined. How is that to be done? To do that he must have the means and the opportunity. Ordinarily that is done by means of an abstract and an examination of the title deeds and other evidences of title which are the property and are in the possession of the vendor. This contract provides that the vendors are not to furnish abstract or title deeds or copies thereof, or evidence of title other than that in their own possession. I think that implies that they have some abstract, and some title deeds and evidences, and it was therefore their duty to furnish these. Until these were furnished the purchaser could not examine the title. Either they were or were not furnished. If they were not, the purchaser could not be bound by the ten day limitation. I think, in the absence of evidence to the contrary, we must assume that the vendors did what it was their duty to do, and that they furnished an abstract and title deeds, etc., without delay. Neither in the pleading or evidence is it objected that the vendors did not comply with that provision of the contract. But whether they did or not, the plaintiff proceeded to examine the title, became aware of the terms of the will, and neglected to raise the objection in question within the time limited, and I re-

Judgment.
MAOLENNAN,
J.A.

gret to be obliged to come to the conclusion that that neglect was fatal. I think the language of the contract is too plain to admit of any doubt. The plaintiff had ten days from the date of the contract to examine the title, and was to be deemed to have waived all objections to title not raised within that time. There is no room to contend that what was meant was objections to the abstract, because it was agreed there should be no objections to the abstract. The defendants were not obliged to deliver any abstract but such as was in their possession. Therefore, objections to title meant just what it said. The vendors reserved the privilege, in case objections were raised which they could not remove, to rescind the contract and have an end of it, and time was made of the essence. If the present objection had been made at the proper time they could have acted upon that stipulation, and could have rescinded, and have brought the business to an end; but the objection not having been made they could not do so, and they remained bound and have continued to be so to the present time. They even went so far as to offer to rescind and pay back the money, but their offer was refused.

The learned Judge has treated this case as one of ordinary conditions of sale, and deals with it in the following language :—

“The plaintiff delivered requisitions within ten days from the date of the agreement; the fourth requisition which I have quoted above, is the only one which refers in any way to the objection now urged. The rule seems to be that in the absence of an express condition that the purchaser shall take a bad title, he is entitled to a good one; and in the absence of such a condition he is entitled at any time before conveyance to shew that the vendor is unable to do that which is the very foundation of the contract, namely, to convey to him the land which he has agreed to purchase. The ordinary conditions of sale are based upon the supposition that the vendor has a title to the property which is the subject of the contract, and are only applicable to that state of things. If the purchaser can shew that the

vendor has no title to that which he professes to sell, and cannot procure one, the conditions of sale cease to be applicable.”

Judgment.

MACLENNAN,
J.A.

I think there is no fault to be found with that statement of the law. But I think the express terms of this contract take it out of the general rule. I think there is here an express stipulation that any objections to the title not raised within a limited time are to be excluded from consideration. They are to be waived, they cannot be insisted on after the time has elapsed. If objections were raised within that time which could not be removed, the vendors could rescind, but if the purchaser did not choose to raise them the vendors remained bound, and were under obligation to complete.

I think the cases of *Want v. Stallibrass*, L. R. 8 Exch. 175, and *Saxby v. Thomas*, 63 L. T. N. S. 695, which were relied upon, are clearly distinguishable. In *Want v. Stallibrass*, the condition was in the usual form. There was to be an abstract delivered, and all objections and requisitions not delivered within a limited time were to be regarded as waived. It is evident that the objections and requisitions there mentioned were objections and requisitions upon the abstract, not objections to the title. That is the plain meaning of the condition, and both the argument of counsel and the judgment of the Court proceed upon that construction of it. The stipulation in this contract does not, in my opinion, admit of that construction, for objections to the abstract are expressly excluded. There is no mention of requisitions, and the objections mentioned are objections to the title. *Saxby v. Thomas*, proceeded on the same ground and followed *Want v. Stallibrass* as an authority. It is clear that a purchaser may agree to take the vendor's title without dispute. This was decided by Sir Knight Bruce, V. C., in *Duke v. Barnett*, 2 Coll. 337. The present agreement is in effect to raise no new dispute as to title after ten days, that is ten days after being put in possession of the means of raising it, and there can be no reason why it should not be as binding as the much harsher agreement in *Duke v. Barnett*.

Judgment.

MAOLENNAN,
J.A.

Pending our consideration of the appeal, we directed it to be spoken to again by counsel as to whether it made any difference, that until long after the expiration of the ten days limited by the contract, both parties were under the mistaken belief that Bridget Peterson took an estate tail under her mother's will. We have heard counsel on that point, and I am obliged to come to the conclusion that it makes no difference. I think that to hold otherwise would be to introduce a new exception and qualification into the contract, which we have no authority to do. It would be to say that objections which were not thought of by reason of oversight or mistake within the ten days, might be raised at any time before completion. I think that is one of the very things which were intended to be guarded against by the stipulation introduced into the contract by the vendors for their protection, and that however great the hardship may be upon the purchaser, we cannot deprive the vendors of the benefit of it.

I therefore think that the plaintiff's action fails, and that the appeal should be allowed.

MCCLELLAND V. ARMSTRONG.

WRIGHT V. ARMSTRONG.

These cases were argued along with *Nason v. Armstrong*, and the judgment in *McClelland's* case must be the same as in *Nason's*. No objection was made to the title within the time limited, and it must be assumed in the absence of any allegation or proof to the contrary that the defendants furnished the plaintiff with the means of making it.

Wright's case is different. In that case the purchaser's solicitors served requisitions, of which No. 5 was in part as follows: "Will of Anne Peterson: Required evidence that Bridget Peterson did not die without issue. That she had power to convey free from the limitations in the devise or bequest to her in her mother's will." This objection is not very clear or precise, but I think it sufficiently

states the defect in the title. That defect consists in the limitation contained in the devise to Bridget in her mother's will, and but for that limitation the devise was sufficient to give a good title in fee simple.

Judgment.
MACLENNAN,
J.A.

It was conceded in the argument before us that this objection or requisition was made in due time, and was therefore good. It was contended that the plaintiff had waived it by his subsequent conduct. I do not think so. I do not see that at any time the plaintiff did anything amounting to a waiver. He went on making payments, hoping that the title would eventually be made good, but that does not oblige him to take a bad title. In *Wright's* case, the appeal must be dismissed.

In Nason v. Armstrong, and McClelland v. Armstrong, the Court being equally divided, the appeals were dismissed with costs.

In Wright v. Armstrong, the appeal was dismissed with costs.

ROBERTSON V. THE GRAND TRUNK RAILWAY COMPANY OF
CANADA.

Railways—Carriers—Limitation of Liability—Conditions—Negligence—Shipping Contract—Horse—51 Vic. ch. 29, sec. 246 (D.)—Damages—New Trial.

The plaintiff delivered to the defendants a race horse for transport over part of their line of railway, nothing being said as to its value, and at the time signed a shipping contract which stated that the horse was received for transport at a special named rate, and that in consideration of this special rate the defendants should not be liable for any loss unless caused by collision, and then only to the extent of \$100. The horse was killed in a collision caused by the defendants' negligence, and the jury found that its value was \$5,000 :—

Held, per HAGARTY, C. J. O. That the special limitation having been entered in good faith on the declared value of \$100, and not for the purpose of evading liability, was valid and not in contravention of 51 Vic. ch. 29, sec. 246 (D.).

Per BOYD, C. That under that section the limitation of liability for damages resulting from negligence was invalid, but that a new trial should be ordered because the damages were excessive.

Per OSLER, J. A. That there is nothing in the Act which forbids a fair agreement between the carrier and shipper limiting the sum for which, in case of loss arising from negligence, the former shall be liable, although the shipper cannot be forced into such an agreement; that in this case the plaintiff was estopped by his own representation from contending that the horse was of greater value than the amount agreed on.

Per MACLENNAN, J. A. That a limitation of liability against damages caused by negligence would be valid as being in effect a pre-ascertainment of the amount of damages, but that the particular shipping contract in question, having regard to the freight classification made under section 226 of the Act, did not effect such a limitation, and that a new trial should be ordered because the damages were excessive.

Vogel v. Grand Trunk R. W. Co., 11 S. C. R. 612, considered.

In the result the judgment of the Common Pleas Division, dismissing the action, 24 O. R. 75, was affirmed.

Statement.

THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 24 O. R. 75.

The action was brought to recover the value of a race-horse received by the defendants from the plaintiff to be carried from Windsor to St. Catharines, and killed in a collision that resulted from the negligence of the defendants' servants.

The horse was shipped under a special contract, fixing the rate and limiting the liability to \$100, and this contract is printed *in extenso* in the report below.

The action was tried on the 7th of March, 1892, before

FALCONBRIDGE, J., and a jury, the value of the horse being found to be \$5,000. Statement.

Judgment was subsequently given for \$4,900, this value less \$100 paid into Court, but the Common Pleas Division set this judgment aside, and dismissed the action, holding that the limitation was valid.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., BOYD, C., and OSLER, and MACLENNAN, J.J.A., on the 24th of November, 1893.

H. H. Collier, for the appellant.

Osler, Q. C., for the respondents.

The arguments were the same as those fully stated in the report below, and in addition to the cases there cited, the appellant's counsel referred to *Moulton v. St. Paul, etc., R. W. Co.*, 31 Minn. 85; *Louisville, etc., R. W. Co. v. Wynn*, 88 Tenn. 320.

April 16th, 1894. HAGARTY, C. J. O. :—

The case is so fully stated in the judgment of my brother MacMahon, that it is not necessary to re-state its facts.

The evidence of Mr. Earls, General Freight Agent at Toronto, states that no agent has any authority to make any contract other than the one produced here, nor to change or alter it :—

“What would be his course supposing the person came and said that he did not propose to take \$100 in case his horse was injured? What would be his course? An agent should refuse to receive the animal.

And do what? Telegraph to headquarters if the man persisted in having it shipped.

What rate would be charged? In Canada we have no rule; it is pretty much in the discretion of the head office what would be charged for a horse in Canada; we have no established rule on that point.”

Again he says :—

Judgment.

HAGARTY,
C.J.O.

“Any person not wanting to take your contract limiting the liability to \$100, you charge him special rates for? Yes.”

The learned Judge commenting on this evidence, says:—
“It is simply to shew that a greater rate would have been charged if he had not accepted this contract.”

It seems clear that when the horse was offered for carriage, the contract in question was produced for the plaintiff's signature, and that he signed the same. It is equally clear that if he had refused to sign it, or to accept \$100 as the measure of damage, his horse would not have been taken, and that a reference would have been made to headquarters.

The rate of \$7.20 for carriage seems clearly fixed as on a declared value of \$100.

I think it a very fair and reasonable course for the carriers to contract that they will carry the animal so valued at the named rate.

If the plaintiff had announced that his horse was a racer worth \$5,000 it is shewn that he could not have it carried without authority from head quarters, fixing a rate in some degree commensurate with the high value and the consequent risk.

It must be borne in mind that the contract before us is by no means an attempt to evade all liability.

In *Grand Trunk R. W. Co. v. Vogel*, 11 S. C. R. 612, the alleged special contract on which the cattle were carried, contained a complete exemption from all liability—a carrying wholly at the owner's risk and at his cost.

This was properly held to be against the letter and spirit of the statute.

We have here what strikes me as a fair bargain between the parties—the carriage of an article of a named and well understood value, and full liability for the results of negligence up to such value.

My brother MacMahon has cited largely from the very instructive case of *Hart v. Pennsylvania R. W. Co.*, 112 U. S. 331. The language there used most lucidly explains

the principles by which an agreement of this character should be governed.

Judgment.

HAGARTY,
C.J.O.

At common law the carrier could limit his liability by condition or special contract.

The Imperial Act of 1854 specially empowers railway companies to make special contracts, which must be signed by the parties, limiting liability, but such contracts must be fair and reasonable.

Our statute has no special provision beyond section 246, on which the *Vogel* case was decided.

In that case it was held to be clearly against the statute to contract for complete immunity from the consequences of negligence, but I am not prepared to hold that a fair and reasonable provision limiting the measure of damage to the declared and agreed on value of the animal or article may not be lawfully entered into, the price of transport being proportioned to such fixed value.

If there had been no actual fixed rate for this horse's carriage, a question might have arisen if the plaintiff had refused to accept this contract, and had insisted on their carrying his horse.

It may be that an action might lie for their refusal to carry on tender of a reasonable price, but we have not to determine any such question.

It appears to me to be most unreasonable to fasten this heavy liability on these defendants in the face of the clear written agreement signed by the plaintiff, a man accustomed to ship horses on the railroad, and presumably well acquainted with the course always pursued.

If the defendants had refused to carry, which it seems clear they would have done if the plaintiff had refused to sign the special contract, then the remedy, if any, must have been by action for the refusal. In such an action there would be no damage such as is here claimed, but only the natural loss from having the horse carried by some other mode than by rail. As already said, the company would undoubtedly have refused to carry on a larger liability than is covered by the express contract.

Judgment.

HAGARTY,
C.J.O.

It seems unreasonable to allow a plaintiff to mislead and deceive them by agreeing in writing to restrict their liability as for a horse valued at \$100, and thus, and thus only, to undertake its carriage, and then to ask for \$5,000, or fifty-fold the agreed on value.

This is contrary to all my ideas of fairness, and I hope that the law does not sanction such a proceeding.

Why may this not be an agreed on value in such a case as this? It seems clear that the rate was based on a general value of \$100, applicable to all horses.

I refuse to consider *Vogel's* case, which is undoubtedly good and binding law, as binding this case. There there was a total refusal of all liability. An illusory limit, or a nominal agreed on value, would not, I think, avail. Here, the value seems very fair and reasonable for all ordinary horses, and the plaintiff formally elects to class his horse under the named average value. He certainly got the benefit of the average low freight, and I am satisfied that he elected, knowingly, so to do, and with full knowledge that it was only on his so electing that his horse would be carried.

I do not see any objection to parties who are contracting for the carriage or bailment or hiring of chattels agreeing that such chattels shall, as between bargainor and bargainee, be considered as of a named value.

This value is an important factor in the treaty for and the completion of the final contract, the premium freight or rent of the article being based on the nature and agreed value thereof.

The insurance of a vessel on a valued policy on an agreed on value, is binding except in a case of fraud, and the premium is based thereon, and so in bailment, hiring or rent of goods.

I am of opinion that the law, as finally declared by our Supreme Court in *Vogel's* case, does not govern this claim, nor does the statute prevent a fair and reasonable contract like that before us.

BOYD, C.:—

Judgment.

BOYD, C.

Comparing the section of the Canadian Railway Act, 51 Vic. ch. 29, sec. 246, (D.) with its English analogue, section 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vic. ch. 31), I think the plain and reasonable meaning of the clause in question is that in case of negligence in the carriage of goods no notice, condition or declaration—whether manifested by general and public advertisement or by any particular provision in a special contract signed by the shipper—shall relieve the railway company from being sued for the damage arising from such negligence. That means, according to the usual import of language, that the liability shall not be restricted or lessened by any such condition. The English statute does in terms provide for the making of a special signed contract by which liability may be limited, and the omission of this provision in the Dominion legislation is most significant against any such modification of liability being implied, as being within the contractual capacity of the corporation. The capacity of the railway company is to be gauged by the language of the statute, and the modern canon of construction is tersely expressed thus by Lord Watson: “Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of their objects must either be expressly conferred or derived by reasonable implication from its provisions.” *Baroness Wenlock v. River Dee Company*, 10 App. Cas. at p. 362.

At present the law is settled by the decision of the Supreme Court in *Grand Trunk R. W. Co., v. Vogel*, 11 S. C. R. 612, that a special contract cannot be made to exempt the company from liability in the case of live stock shipped on the railway. To my mind, the fair reading of

Judgment.

BOYD, C.

the statute indicates that a like disability exists as to the limitation of the amount of damage to be recovered in case of loss from negligence. The minority of the Judges in the Supreme Court read the words : " Notice, condition, or declaration," as meaning a public, general notice—not including the case of a special contract. But *Peek v. North Staffordshire R. W. Co.*, 10 H. L. C. 473, shews that the word " condition," used in the Railway and Canal Traffic Act, 1854, means a condition embodied in a written contract signed by the shipper. Lord Blackburn there points out very clearly how in general law any notice of restriction given in respect of the common carrier's liability, must operate as a matter of special contract and not as a public condition limiting the profession of the carrier, p. 496. And at p. 508 he says : " Conditions (as I think) could not operate unless contained in a special contract."

Mr. Justice Vaughan Williams, at p. 545, notes that the statute in question omits the word " public" before " notice and declaration," which was found in the earlier Carriers' Act, and then says (in language pertinent to the construction of sub-section 3 of section 246) : " The effect of the clause is not only to render all such notices, conditions and declarations inoperative *per se*, but to nullify all contracts which shall be founded on any assent to them."

Cockburn, L. C. J., says, p. 562 : " The word ' condition' is inconsistent with anything other than an actual contract."

It is further to be observed that if this construction prevailed (as it did in the Lords), under the wording of the English Act, which says, " Notice, condition, or declaration made and given by the company," *a fortiori* should it obtain in the Canadian phraseology, which says : " The company shall not be relieved by any notice, condition, or declaration"—language not pointing to the sole act of the company, but suggesting the idea of mutuality as in case of contract.

This position is confirmed by the judgment of Lord Esher in *Dickson v. Great Northern R. W. Co.*, 18 Q. B. D. 176, where the condition as to the carriage of a dog was

contained in a printed ticket signed by the plaintiff. Commenting on section 7 of the Act of 1854, he says, p. 180: "Then by section 7 of the Act it is provided that the company shall be liable for the loss of or any injury done to any horses, cattle or other animals, * * * by the neglect or default of such company, or its servants, notwithstanding any notice, condition, or declaration made or given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being thereby declared void. If the section stopped there the company would be bound to carry dogs for hire, but not, I think, as common carriers. I think their liability would be that of bailees for reward, and such liability could not be affected or limited by any notice, condition, or declaration they might make or give."

Judgment.
Boyd, C.

But our Act stops at such a point, and, therefore, the company cannot procure relief from answering the damages arising from negligence by any notice, condition, or declaration.

What was attempted in this case, was a very imperfect imitation of the method of procedure authorized by the Railway and Canal Traffic Act of 1854 for Great Britain, but which has not been brought into Canadian legislation. One proviso, as to live stock, of section 7 of that Act, is that no greater damages shall be recovered for the loss of or for any injury done to any of such animals beyond the sums hereinafter mentioned (that is to say), for any horse, fifty pounds, * * for any sheep or pigs per head, two pounds, unless the person sending * * shall at the time * * have declared them to be respectively of higher value than as above mentioned, in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums so limited as above. Upon the effect of this clause was decided *Dickson v. Great Northern R. W. Co.*, 18 Q. B. D. 176, as to a dog, from which I have quoted. Another case is *Great Western*

Judgment.
Boyd, C.

R. W. Co. v. McCarthy, 12 App. Cas. 218, in which cattle were carried under a special contract, stating that the company had two rates for the conveyance of cattle, one the ordinary rate when they took the ordinary liability of the carrier; the other a reduced rate; that these cattle were carried at the reduced rate, the company to be relieved from all liability in case of damage or delay, except upon proof that the loss arose from the wilful misconduct of the company. By this the company were held to be protected as a proper condition, for the shipper had the offer of a just and reasonable alternative. It may be that legislation is needed to empower railways in Canada to adopt alternative rates as between *e.g.* horses *and* horses, but, assuming it could be done without, here it does not appear that any option was given to the plaintiff; he was not told of any alternative, nor was there indeed any provision made in Canada for the transportation of high-price horses at higher rates on the road. The company had a uniform rate for horses—based, it may be, on some average of weight or value, which was charged and paid as a matter of course. And upon this they impose the condition that limits the scale of damages in case of loss from negligence, which it appears to me transcends the statutory powers, and is not made any the better because the shipper has signed the writing in which it is embodied. The Canadian Act strikes at this, lest the public be coerced by a practical monopoly (see *Manchester, etc. R. W. Co. v. Brown*, 8 App. Cas. at p. 712), in other words, the attempt is made without legislative power to introduce an owner's risk at reduced rate as the standard, so as to relieve the company from their full risk, which as carriers they would be subjected to by collecting the ordinary or proper rate. Apart from what has been said, it appears to me that the whole scheme of the Canadian Act is repugnant to this method.

The key to the English decisions is that the law there permits special contracts to be made (if the terms are just and reasonable), but the Dominion statute excludes the power of specializing rates, and makes provision for the

fixing by Order in Council of general lawful and equal rates for goods, etc., of the same description, and to be uniformly classified : sections 223 to 233. That is, there may be a fixed charge for race or blood horses, as distinguished from others, or it may be based upon the value of the animal ; but not one uniform rate, for all horses, which, by the imposition of conditions neither sanctioned by Order in Council, nor by the provisions of the Act, shall operate specially in the case of the more valuable animals, so as to exempt the company from the consequences of negligence in the transit.

Judgment.
Boyd, C.

In fine, I think *Vogel's* case decides this. The effect of that decision appears to be accurately glossed by Strong, J., in *Grand Trunk R. W. Co. v. McMillan*, 16 S. C. R. at p. 550, thus : The provision of the statute incapacitates the company from entering into any contract or exacting any condition limiting its liability for negligence or omission.

I agree, however, with the view of Mr. Justice MacMahon, that there should be a new trial because of excessive damages in view of the plaintiff's sworn valuation of the horse.

It may be that other evidence can then be given as to alternative rates not now before us.

OSLER, J. A. :—

Section 246 of the General Railway Act of 1888, enacts that the defendants shall furnish sufficient accommodation for the transportation of all such goods as are, within a reasonable time previously thereto, offered for transportation at the place of starting of the train.

2. That such goods shall be taken, transported and discharged on due payment of the toll, freight, or fare, lawfully payable therefor ; and,

3. That in case of neglect (which includes negligence in carrying and transporting the goods : *Grand Trunk R. W. Co. v. Vogel*, 11 S. C. R. 612, at p. 628, per Strong, J.) the person aggrieved shall have an action therefor against the

Judgment.

OSLER,
J.A.

liability for negligence imposed by section 246, sub-section 3, and therefore the expression "owner's risk" attached to certain classes of goods in the freight classification must receive the more limited interpretation, and cannot extend to the risk of loss by the carrier's negligence. I refer on this point to the observations of Moss, C. J., in *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. at pp. 625-626, and 629; of Ritchie, C. J., in the same case, 5 S. C. R. at pp. 213, 214, and the cases cited in *Dixon v. Richelieu Navigation Co.*, 15 A. R. at pp. 661-662. And see *Mynard v. Syracuse, etc., R. W. Co.*, 71 N. Y. 180. It may here be noted that *Fitzgerald's* case was decided prior to the railway legislation which we are now considering. If, indeed, the defendants' liability is only that of bailees for hire, the terms so construed may be meaningless or inoperative, but that is the consequence of the enactment, which expressly disables them from exempting themselves from liability for loss arising from their negligence. And whether their duty to carry arises from their being common carriers or from being bailees for hire, there is nothing in our Act corresponding with that proviso in the seventh section of the Imperial Railway and Canal Traffic Act which enables carriers in England to relieve themselves from the liability for negligence imposed by that section by means of a special contract with conditions which a Court or Judge may deem just and reasonable. The absence of any such provision in our Act appears to me to point strongly to the intention of the Legislature that carriers should not be permitted to exempt themselves from loss arising from negligence, and to require that sub-section 3 should be construed as I cannot but think section 7 of the Railway and Canal Traffic Act would have been construed had it not contained the proviso I have mentioned.

The object of our Act as of the English Act was to prevent the oppression of the shipper by the carrier, but with us the Legislature has not thought fit to enable the parties by special contract on reasonable conditions to waive the

protection of the Act. These positions are, I think, established by *Grand Trunk R. W. Co. v. Vogel*, 11 S. C. R. 612, which decided :—

Judgment.

OSLER,
J. A.

1. That the word "neglect" in the statute includes, as I have already said, neglect in carrying as well as neglect or default in omitting to carry.

2. That the words "notice, condition, or declaration," embrace the case of special contract, so that the company are prevented from contracting themselves out of liability for negligence ; and,

3. That the word "goods" in the section includes horses.

The further question whether goods carried by the car load are within the Act was also decided, but does not arise here.

There is nothing in the case of *Bate v. Canadian Pacific R. W. Co.*, 15 A. R. 388, which bears upon this case, or which is inconsistent with the decision in *Vogel's* case, as the Court below seem to assume. What this Court there decided was that the loss had not occurred through the negligence of the defendants, and, therefore they were entitled to rely upon the special contract limiting their liability to \$100. My brother Burton dissented on the ground that the jury had found the special contract not proved, and therefore there was nothing to restrict the defendants' ordinary liability as common carriers. His view was adopted by the Supreme Court, and the judgment of this Court was reversed on that ground. The note of the judgment of the Supreme Court, as it appears in 18 S. C. R. 697, states that they also held that the loss had occurred through negligence, but that was unnecessary for the decision of the appeal if there was no special contract; and the copy of the judgment, furnished to us by the reporter soon after it was delivered, says merely that the appeal was allowed for the reasons stated in the judgment of Burton, J. A. The point, therefore, seems quite open, whether by agreement beforehand the company and the shipper can limit or assess the amount of damage which the former shall

Judgment. MACLENNAN, J. A. :—

MACLENNAN,
J.A.

The first question is what are the obligations of the Grand Trunk Railway Company generally with regard to the carriage of horses ?

By the joint effect of sections 3 and 306 of the Railway Act of Canada, 1888, that Act, with certain exceptions not material to the present case, is made applicable to the defendants and their railways.

By section 246 the company is required to furnish sufficient train accommodation for the transportation of all passengers and goods, and to take, transport and discharge the same on payment of legal fare or toll, and an action is given to every person aggrieved by any neglect or refusal in the premises, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or its servants.

By the interpretation clause the word "goods," wherever used in the Act, is defined to include within its meaning "things of every kind that may be conveyed upon the railway."

With the exception of the proviso preventing the company from relieving themselves from actions for negligence, which was first enacted in 1871, these clauses are almost identical with section 21, sub-section 2, of the Railway Clauses Consolidation Act of Old Canada, 14 & 15 Vic. ch. 51, and the corresponding interpretation clause of that Act, which was always applicable to the defendants' company.

In *Grand Trunk R. W. Co. v. Vogel*, 11 S. C. R. 612, the present Chief Justice of Canada expressed doubts whether the word "goods" in the corresponding section of the Railway Act of 1879 included horses and cattle and other live stock. I think, however, although the point is not expressly mentioned in the judgments of the other members of the Court, it must be taken to have been decided by the majority of the Court in that case that it did ; and I think

that if the attention of the learned Chief Justice had been called to the interpretation clause it would probably have removed his doubt. It seems to me impossible to say that the words "things of every kind that may be conveyed upon the railway," are not large enough to include horses and cattle and other live stock.

Judgment.
MACLENNAN,
J.A.

When, therefore, the plaintiff brought his horse to the company's station and requested transportation for him, they could not refuse to carry him, it being proved that they had the means for, and were in the habit of, carrying horses. They were under a statutory obligation to do so. But it by no means follows that because they were under a statutory obligation to carry the horse, they were therefore common carriers of horses. In *Dickson v. Great Northern R. W. Co.*, 18 Q. B. D. 176, the Court of Appeal in England held that although that railway company was obliged by 17 & 18 Vic. ch. 31, sec. 2, to afford reasonable facilities for carrying dogs, that did not make them common carriers of dogs. That could only be done by their professing to do so. Lindley, L. J., says (at page 183): "At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; and if a carrier says he will not carry dogs except on certain terms, he can lawfully refuse to carry any particular dog on any other terms." And at page 185 he says: "Railway companies are bound to provide reasonable facilities for carrying animals or particular classes of goods, but it by no means follows that they are liable as common carriers for what they are bound by statute to carry. * * Whether railway companies are common carriers of particular classes of goods depends upon what they habitually do or profess to do with respect to such goods."

It was not material in the *Vogel* case to determine whether the defendants were common carriers of horses, for it was an action for negligence, and all that was de-

Judgment. cided was that horses were goods within the meaning of
MACLENNAN, the Act, that they were therefore obliged to carry them,
J.A. and that the special contract stipulating for exemption from liability for negligence was void.

The transaction which was in question in that case took place in 1882. Since that time a new clause has been added to the Railway Act, section 226 of the Act of 1888, which seems to have an important bearing on the present case. That section provides that "the company in fixing or regulating the tolls to be demanded and taken for the transportation of goods, shall * * adopt and conform to any uniform classification of freight which the Governor in Council, on the report of the Minister, from time to time prescribes." In pursuance of this section a classification has been prescribed by the Governor in Council, and has been adopted by the defendants. It is substantially the same as that found at p. 73 *et seq.*, of the Orders in Council published in the Dominion Statutes of 1892. Rule 7 of this classification, p. 75, declares that all articles marked "O. R." in the classification must be so receipted for by the agents, and the words "owners' risk" written in full on the shipping notes and receipts. Provided that in case, where shippers decline to accept such receipts endorsed "owner's risk," or to sign such releases, the goods may be received for shipment on ordinary shipping notes and receipts without above endorsation at fifty per cent. in addition to the rates which would be charged if shipped at owner's risk, with the exception of plate glass, which will be at double the rates which would be charged if shipped at O. R. Then in the classification proper, p. 89, it is said: "Live stock will only be carried at owner's risk, to be loaded, unloaded, and fed by owners, or at their expense, as follows:" after which follows a specification of different kinds of animals and the different modes of carriage, whether by the car load or less than a car load, and as to horses, it says: "Horses, mules, etc., one animal 2,000 lbs.," meaning that a single horse is to be regarded as weighing 2,000 lbs., and is to be

charged for at so many cents per 100 lbs. in proportion to mileage, and the rate of toll is to be the first class, that is, the lowest rate. There are ten classes altogether, the tenth, as I understand it, being the class for which the highest rates are charged. Then follows this statement: "Above weights and rates are based upon, and intended for, animals of ordinary value only." Now, I think the meaning of all this, as applied to a horse of ordinary value, is that the owner is allowed the option of treating the company either as a mere bailee for hire, or as a common carrier. In the one case the risk of ordinary accidents is with the owner; in the other with the company. In the one case the company receives one rate of toll; in the other a certain fixed higher rate, the words "owners' risk" referring, as decided in *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 601, to the risks of carriage other than those of damage arising from negligence of the company or their servants.

Judgment.

MACLENNAN,
J.A.

But the classification document contains further provision about horses as follows: "Race horses and other valuable animals will be carried at the same weights and rates on condition that the owners sign a written agreement as follows: 'At owner's risk of loss or damage arising from any cause whatever.' This must be written on the face of the consignment note and receipt." And these animals are not assigned to any one of the ten classes of freight. There may be difficulty in reconciling this part of the classification with the clause of the Act forbidding conditions relieving the company from actions for negligence. A race horse, or other horse of great value, may be as readily carried by a railway as a horse of ordinary value, and yet the regulation seems to enable the company to refuse to carry such an animal except on the terms of complete exemption from liability, even in case of negligence.

In this case, however, the horse was not tendered as a race horse, or a horse of more than ordinary value. The most that the owner said to the company was that he was

Judgment. a good horse, and it is therefore unnecessary to express any
MACLENNAN, decided opinion upon the meaning and effect of that part
J.A. of the classification relating to race horses.

What happened was that the plaintiff brought his horse to the station, and asked for transportation, saying he had a good horse and wanted a good car; a car was provided and the horse was placed therein, and the contract in question was signed by him and the company's agent.

The company contends, and the Divisional Court has decided, that by this contract the plaintiff is restricted in his damages for the loss of his horse to \$100, and the question is whether that is so.

Sections 223 *et seq.* of the Railway Act, require that the tolls to be taken by the company shall be subject to the approval of the Governor in Council, and the tariff of charges put in evidence shews that the rate charged for the plaintiff's horse, viz., \$7.20, is the ordinary shipping rate referred to in Rule 7 of the classification, when the animal is carried at owner's risk. According to the tariff and the provisions of the freight classification, there were two rates and two only which the company could lawfully charge and receive for the carriage of the horse, viz., \$7.20 if carried at owner's risk. and 50 per cent. more, or \$10.80 if at the risk of the company. It is true there was another alternative mentioned in the classification, namely, that if the horse was to be treated as a race horse, it would be carried at the ordinary rate, "at owner's risk of loss and damage from any cause whatever," but as that stipulation is contrary to the statute, it need not be regarded. Now, instead of following the tariff as illustrated by the classification, and having the horse carried at the lower rate at owner's risk, or at the higher rate at the company's risk, the parties entered into the special contract, and the question is as to its true construction.

If I thought this agreement covered loss resulting from the negligence of the company or its servants, I should be of opinion that the limitation of liability to the sum of \$100 was valid. I do not see why the owner and the

company may not agree either upon the actual value of the goods to be carried, or upon a sum which shall be regarded as the outside value, for the purpose of the contract. If a loss should occur, the value must be ascertained sooner or later, and either by agreement or by means of a Court or jury. The statute does not in terms forbid such an agreement. It merely says the company shall not be relieved *from the action* by agreement. As observed by the present Chief Justice of Canada in the *Vogel* case, "every presumption must be made against an intention to interfere with the freedom of contract," and, therefore, I think, the interference which Parliament intended by the section in question ought not to be extended by construction beyond the fair meaning of the language employed; and that it does no more than to prevent a company by the means there expressed from relieving themselves *from actions* for negligence. Of course the case of a plain evasion of the statute by fixing a merely nominal value upon the goods might admit of different considerations.

Judgment.

MACLENNAN,
J.A.

I am, however, of opinion that this agreement does not cover a case of loss by negligence.

As I have said, I think the classification gives the shipper the option of treating the company either as a common carrier, or as a bailee for hire, and that the risk therein referred to is the ordinary common carrier's risk, and not the risk of loss or damage from negligence. I think that is the risk that is meant generally in the classification where the words "owner's risk" alone are used; and this conclusion is strengthened by the use with reference to race horses, of more extensive words, namely, "risk of loss or damage from any cause whatever." An ordinary horse is to be carried simply at owner's risk. While a race horse will only be carried at owner's risk of loss or damage from any cause whatever, the additional words in the latter case being intended to include cases of negligence.

Now I think the case of *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 601, above referred to, and the English cases there



Judgment.

MACLENNAN,
J.A.

cited by Moss, C. J., and also the case of *Dixon v. Richelieu Navigation Co.*, 15 A. R. 647, oblige us to hold that the risk which the present agreement provides for, is the ordinary risk of accident only, and not the risk arising from negligence; and that the loss and damage which are mentioned are subject to the same qualification. When it is borne in mind that the company is prohibited from relieving themselves from actions for negligence, it follows that we must, if possible, read the agreement as not intending or attempting to do what the statute forbids. Therefore, the delay, the escape, or loss from the cars, the bruising or wounding of the animals, the crowding, the improper loading or unloading, which are mentioned as cases of loss or damage from which the company is to be exempt, must mean accidental delay, accidental escape, or loss, etc., and not delay, escape, or loss arising from negligence. Then comes an exception: "Except such as may arise from a collision of the train or the throwing of the cars from the track during transportation."

Now the antecedent to the pronoun "such" is "injuries or damage happening to said stock while in the cars of the company." Therefore the agreement means to say that the company is to be exempt from liability for injuries and damage to the stock while in the cars, except such injuries and damage as may arise from collision or derailment; and if the injuries and damage for which they are to be free from liability, are merely accidental injuries and damage, it follows that the exception must be qualified in the same way, and that it means accidental collision and derailment only. By their agreement, therefore, as I think, the company expressly leave themselves liable for injury or loss arising from either of these two kinds of accident. The agreement then goes on as part of the same sentence to say, "and the company shall in no case be responsible for an amount exceeding \$100 for each or any horse * * transported."

If I am right in thinking that the excepted cases are cases of accidental collision and derailment only, I think

it is these cases and these only which are referred to by the words "in no case" in this limitation clause. If the company intended to provide for cases of negligence, they would not have left it in doubt, but would have expressed their meaning in clear language, as stated by Moss, C. J., in *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. at p. 627.

Judgment.

MACLENNAN,
J. A.

I am, therefore, of opinion that while, if the present action had been for loss arising from an accidental collision, the defendants would have been liable, but only for \$100, yet the collision having occurred by reason of the negligence of the company's servants, the case is not within the contract, and the defendants cannot claim the benefit of it.

I agree, however, with the Chancellor that there ought to be a new trial for excessive damages,

*The Court being equally divided, the
appeal was dismissed with costs.*

SUTHERLAND V. WEBSTER.

*Covenant — Indemnification — Assignment — Ascertainment of Liability—
Chose in Action—Unliquidated Damages—Action Quia Timet.*

Upon a covenant by an incoming partner to indemnify and save harmless a retiring partner against the liabilities, contracts and agreements of the firm, no cause of action accrues to the covenantee merely because an action to recover unliquidated damages for an alleged breach of agreement has been brought against the firm.

Mewburn v. Mackelcan, 19 A. R. 729 ; and *Leith v. Freeland*, 24 U. C. R. 132, distinguished.

Such a covenant is not assignable by the covenantee to a plaintiff suing the firm so as to enable him to join the covenantor as a defendant in the action to recover against him the damages for which the firm may be ultimately held responsible.

Judgment of GALT, C. J., affirmed.

Statement. THIS was an appeal by the plaintiffs from the judgment of GALT, C. J., allowing a demurrer.

The statement of claim and the demurrer thereto were as follows:—

1. The plaintiffs are dealers in cooperage stock in the town of Chatham, and the defendants Webster & Huston were, at the time of the making of the contracts hereinafter referred to, stave manufacturers, doing business at the town of Dresden, in the county of Kent, and the defendant Edward Huston also resides at the town of Dresden, and after the making of said contracts, became a partner in the firm of T. A. Huston & Company, which was composed of the said T. A. Huston, who formerly was a partner with I. B. Webster, and the said Edward Huston, the latter having bought out the interest of the said I. B. Webster, of the said firm of Webster & Huston, and the new firm did business under the name of T. A. Huston & Co.

2. On the 18th day of January, 1892, the plaintiffs and the said firm of Webster & Huston entered into an agreement in writing for valuable consideration, by which the said firm of Webster & Huston agreed to sell to the plaintiffs, and the plaintiffs agreed to purchase from the said firm of Webster & Huston, 400,000 elm staves, known in the trade as No. 2's, 28½ and 30 inches in length, at the price

or sum of \$3.00 per gross thousand ; and also 2,000,000 elm staves 28½ and 30 inches in length, and known in the trade as No. 1 elm staves, at the price or sum of \$5.50 per gross thousand, the quantities in each case being what is known in the trade as gross thousands, all of which staves were to be shipped "free on board" the cars at Dresden, Ontario, for the said price, and the said defendants were to commence shipping under the said agreement in May, 1892, and the shipments were to be fully completed by the 31st of December, 1892. Statement.

3. Subsequently, on the 29th day of February, 1892, the plaintiffs and the said firm of Webster & Huston, entered into another agreement in writing for valuable consideration, by which the said firm of Webster & Huston agreed to sell to the plaintiffs, and the plaintiffs agreed to purchase from the said Webster & Huston, 1,000,000 elm staves, 28½ and 30 inches in length, and known in the trade as No. 1 elm staves, at the price or sum of \$5.50 per gross thousand, the quantities in each case being what is known in the trade as gross thousands, all of which staves were to be shipped "free on board" the cars at Dresden, Ontario, and the said defendants were to commence shipping under said agreement on May 1st, 1892, and the shipments were to be fully completed by the first day of March, 1893, and to these two agreements for more particularity at the trial of this action the plaintiffs crave leave to refer.

4. The said contracts referred to in the two preceding paragraphs, each contain the following provisions:—"That it is mutually understood and agreed that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties to these presents, and also that the staves are to be shipped when in good condition, or if held, to be drawn for in thirty days."

5. On the tenth day of December, 1892, Isaac Benjamin Webster, of the said firm of Webster & Huston, with the consent of his partner, T. A. Huston, sold and conveyed his interest in the said firm of Webster & Huston

Statement. to the defendant Edward Huston, the father of his co-partner, subject to the condition, and the said Edward Huston covenanted and agreed, that he, the said Edward Huston should at all times indemnify and save harmless the said Isaac Webster of and from all and every of the liabilities, contracts and agreements of the firm of Webster & Huston.

6. The defendants, Webster & Huston, had delivered only a portion of the staves sold as aforesaid to the plaintiffs at the time the said Webster sold out to the said Edward Huston, and the business of the late firm of Webster & Huston was continued under the firm name and style of T. A. Huston & Co., who took over the assets of the firm of Webster & Huston, and assumed their liabilities.

7. The firm of T. A. Huston & Co., composed of T. A. Huston and Edward Huston, delivered a certain quantity of said staves to the plaintiffs in pursuance of the contracts hereinbefore referred to, to wit, three hundred and six thousand staves, but the plaintiffs, although they frequently requested it, were unable to obtain delivery from the defendants of the quantity of No. 1 elm staves provided for in the contracts hereinbefore referred to at the time specified for completing delivery of said staves, and the defendants refused to deliver any further or other staves to or to fulfil the said contracts with the plaintiffs.

8. The plaintiffs procured from I. B. Webster on the 31st day of August, 1893, an assignment of the benefits of Edward Huston's covenants, express or implied, by which the said Huston covenanted to indemnify and save harmless the said I. B. Webster from all and every of the liabilities, contracts and engagements of the firm of Webster & Huston, but the plaintiffs expressly reserved their rights against the said I. B. Webster, and the plaintiffs notified the said Edward Huston of said assignment immediately after procuring the same.

9. The plaintiffs were entitled to have delivered to them according to said contracts, "free on board" the cars at Dresden, 3,000,000, No. 1 staves, and all things have been

and were done by the plaintiffs to entitle them to said **Statement.** staves, but the said Webster & Huston only delivered 1,326,050 of No. 1 staves, and the firm of T. A. Huston & Co., delivered 306,000 No. 1, elm staves, or in the whole 1,632,050 No. 1 elm staves were delivered to the plaintiffs under said contracts, and a part of said staves were accepted after the time for delivery had elapsed, but the plaintiffs had waived the time of delivery to the said firm.

10. The plaintiffs have suffered damage by the breaches of said contracts for sale and delivery by the defendants Webster & Huston and Edward Huston, being short in their delivery 1,367,950 gross quantity of what is known in the trade as No. 1 elm staves, of the dimensions provided for in the said contracts, the defendants Webster & Huston and T. A. Huston and Edward Huston having delivered 1,632,050 No. 1 elm staves only; and after the first day of March, 1893, the plaintiffs, owing to the defendants' failure and refusal to deliver according to said contracts hereinbefore referred to, were compelled to go on the market and buy 1,367,950 gross, known in the trade as No. 1 28½ and 30 inch elm staves, to fill contracts made by the plaintiffs, the plaintiffs thereby suffering a loss of ninety-seven cents per thousand, amounting in all to \$1,326.91.

11. The plaintiffs claim to recover from the defendants the sum of \$1,326.91 damages as aforesaid and costs of action.

The defendant Edward Huston demurs to the whole of the plaintiffs' claim, and says that the same is bad in law as against this defendant, on the grounds:—

1. That the statement of claim does not shew that there is any privity between this defendant and the plaintiffs or any liability on the part of this defendant to the plaintiffs.

2. That this defendant is not liable to the defendant Webster (if at all) until after a claim shall have been established by judgment or otherwise against the defendant Webster, or the firm of Webster & Huston; and no right of action existed before the commencement of this

Statement. action in favour of Webster against this defendant, and the plaintiffs cannot by an assignment obtain from Webster a right of action which Webster did not have.

3. That the statement of claim does not shew any new or substituted contract by this defendant with the plaintiffs.

4. That the claim (if any) of Webster as set forth in the statement of claim is not a debt or chose in action assignable to the plaintiffs, and the alleged assignment thereof has no effect as against this defendant.

5. That even if such a claim were assignable the plaintiffs cannot in their own name, without joining Webster as a plaintiff, sue or bring an action against this defendant, upon or by reason of the alleged contract entered into between this defendant and Webster.

6. That the contract alleged and set forth by the plaintiffs is not such a contract as would enable the defendants Webster and Huston to bind this defendant as an assignee of the defendants Webster and Huston, and in any event this defendant is not shewn to be an assignee of defendants Webster and Huston.

7. That it is not alleged and shewn that the plaintiffs had any contract or agreement with the firm of T. A. Huston & Co., which is the only firm of which this defendant is a member.

8. That the plaintiffs do not make any claim against this defendant under the assignment from I. B. Webster to the plaintiffs.

And for other grounds sufficient in law to sustain this demurrer.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 26th of April, 1894.

Moss, Q. C., for the appellants. The assignment from Webster is good and gives a right of action against Huston: *Werderman v. Société Générale d'Electricité*, 19 Ch. D. 246; *Young v. Robertson*, 2 O. R. 424. Webster is entitled to be indemnified by Huston and need not wait till judgment is

recovered against him: *Mewburn v. Mackelcan*, 19 A. R. 729. The words here are the same as those in question in that case. It is only by compelling Huston to come in and pay that Webster can be saved harmless. See also *Boyd v. Robinson*, 20 O. R. 404; *Joice v. Duffy*, 5 U. C. L. J. 141; *Leith v. Freeland*, 24 U. C. R. 132. *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561, is distinguishable, because there the plaintiff had not in fact been called on to pay. Con. Rule 301 allows the joinder of all defendants against whom any relief is possible: *Chaput v. Robert*, 14 A. R. 354, at p. 361. See also Rule 324. A covenant of this kind is assignable, arising as it does out of contract: *Irving v. Boyd*, 15 Gr. 157; *British Canadian Loan Co. v. Tear*, 23 O. R. 664; *Laidlaw v. O'Connor*, 23 O. R. 696; and particularly the cases there cited. See also, Bouvier, "Chose in action."

W. M. Douglas, for the respondents. The action is really framed as upon a novation and not as upon an assignment, and the appellants are arguing outside their statement of claim. But if entitled to discuss the question at all, the right to relief is not shewn. The action is premature. The authorities go far enough to shew that payment is not a condition precedent, but there must be some ascertainment of the damages before the right of indemnity can be enforced or assigned, while the appellants' contention is that action can be brought at once upon breach. This is not so. The covenantee must either pay, or at least be bound to pay, and cannot get a mere precautionary judgment: *Smith v. Teer*, 21 U. C. R. 412, at p. 416. Here there is no indemnity against payment of an ascertained amount. *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561, is not distinguishable. The plaintiff in that case had been called on to pay by being placed on the list of contributories. See also *Eddowes v. Argentine Loan Co.*, 62 L. T. N. S. 602, 63 L. T. N. S. 364; *Antrobus v. Davidson*, 3 Mer. at p. 579. If this right is assignable at all it must be assignable to any one, and this shews how strained the contention is.

Moss, Q. C., in reply.

Judgment. May 8th, 1894. HAGARTY, C. J. O.:—

**HAGARTY,
C.J.O.**

Mr. Moss, in a very able argument, urged to us that under the Judicature Act and the Rules the Court could work out the rights and equities of the parties on this declaration, and that the defendant should not have demurred but should have pleaded any defence he has in ordinary course. His argument amounts to this, that as the defendant Edward Huston had covenanted to indemnify Webster, and as the plaintiffs were the assignees of his rights against him, the Court could and should so adjust the equities that whatever damages the plaintiffs could recover against their original contractors could be assessed against the defendant Edward Huston on his covenant to indemnify instead of having resort to the old-fashioned and clumsy course of limiting the plaintiffs' recovery to their privies in contract, leaving Webster to pursue his remedy for indemnity. Such a proceeding would at least have the merit of intelligibility.

But I think it a sufficient answer to this that here no such remedy is asked or sought for; the claim is based on the defendant Edward Huston being liable on these contracts whether directly or by novation or any other means.

To agree to indemnify a person from a contract into which he has entered seems to me a very different thing from placing the indemnifying party in the position of a party to such contract.

There is no averment here of the nature or extent of any claim possessed by Webster in respect of his alleged liability on these contracts, whether to the extent of nominal damages or to the full extent of the damages here claimed by the plaintiff.

These damages are claimed against all three defendants, Webster, T. A. Huston, and Edward Huston. If there be a joint recovery against all three, or against Webster alone, we can understand the remedy of the latter against Edward Huston for indemnity. His assignment of the covenant to the plaintiffs, who reserved their rights against him,

cannot, in my opinion, be a bar to their asserting these reserved rights.

Judgment.

HAGARTY,
C.J.O.

I think the demurrer is right, and the appeal should be dismissed.

Under the present practice we are not very exacting in the matter of pleading. But I am strongly opposed to such a total departure from all our ideas of plain and intelligible statement, as to allow the latitude claimed by the plaintiffs in setting forth the nature of their case.

OSLER, J. A. :—

The plaintiffs sue Webster and T. A. Huston, the partnership firm with whom they made the contract for the breach of which this action is brought, and with them they also sue one Edward Huston who had bought out Webster's interest in the partnership, and to whom he had given a covenant that he would at all times save harmless and indemnify him of and from all and every of the liabilities, contracts, and agreements of the firm of Webster and Huston. The plaintiffs allege that before action they procured from Webster an assignment of this covenant, and it may be assumed in favour of the pleading, though it is not so alleged, that as to Edward Huston the plaintiffs sue in their character of assignees. The case does not turn upon a misjoinder of defendants. That is not a ground of demurrer but of a motion to strike out the name of the person improperly joined. The question is simply whether the plaintiffs shew a cause of action against Edward Huston. If Webster was in a position when he made the assignment to have maintained an action against him on the covenant, then he is properly joined as a party defendant now, nor would I scrutinize too closely the raggedness of the plaintiffs' presentation of the case against him.

But what possible cause of action had Webster at that time, or the plaintiffs as his assignee when they brought their action ?

The case has no likeness to *Leith v. Freeland*, 24 U. C.

Judgment.

OSLER,
J.A.

R. 132, which has been cited. That was the case of a bond conditioned that a third person would pay certain sums by days named, which were past when the action was brought, in discharge and ease of the plaintiff who was liable therefor. The moment those periods elapsed without payments being made the plaintiff's cause of action was complete. In *Mewburn v. Mackelcan*, 19 A. R. 729, we recently held that on a bond to indemnify and save harmless the obligee from payment of all liability of every nature and kind whatever arising out of a former partnership, a cause of action arose against the sureties in favour of the obligee as soon as judgment was recovered against him, and before its payment. The recovery of the judgment and the certainty and finality of the charge thereby imposed upon the obligee—his fixed and final liability to pay the sum recovered, and to have an execution therefor enforced against his property—were held to be a sufficient damnification. But in this case Webster has not been damnified. There is as yet no breach of Edward Huston's covenant. He has not undertaken that no one shall sue Webster, but only to indemnify him against the liabilities, contracts, and obligations of the firm. The plaintiffs may not succeed in proving the cause of action alleged, and if they fail and Webster recovers his costs, he could not, nor could the plaintiffs, as his assignee, say that the covenant had been broken. The case has no likeness either to that class of cases in which the liability to be indemnified against has been already ascertained, as in the case of a money debt, where the surety has been held entitled before he has paid anything to maintain a bill to compel payment of the debt and indemnity; such for example as *Wooldridge v. Norris*, L. R. 6 Eq. 410; *Lacey v. Hill*, L. R. 18 Eq. 182. See also Story's Equity Jurisprudence, 2nd English ed., secs. 727, 730, 849, 850. *Joice v. Duffy*, 5 U. C. L. J. 141, was a similar case, being a bill filed by the mortgagor against the purchaser of the equity of redemption to compel him to pay off the mortgage. (This case, which is one of some interest as an early enun-

ciation in the Courts of this country of the principle that the mortgagor becomes, under such circumstances, surety to the mortgagee for payment of the debt, is not elsewhere reported or noted.) Here the plaintiff's claim is for unliquidated damages, the liability for, and amount of, which have yet to be established; and I have seen no case in which it has been held that an action will lie *quia timet* under such circumstances at the suit of the person to be indemnified.

Judgment.

 OSLER,
J.A.

I refer also to the case of *Wolmershausen v. Gullick*, [1893] 2 Ch. 514, and cases cited there; and the cases referred to by Mr. Douglas of *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561; *Eddowes v. Argentine Loan Co.*, 63 L T. N. S. 364.

Webster might, no doubt, have brought in the defendant Edward Huston, and he may still be brought in under the third party rules, so as to be bound by the amount which may be recovered against the defendants, but that is the only character in which he can appear in the action. I have considerable doubt whether a covenant of this kind is an assignable chose in action under the Act, at all events before the person to be indemnified has paid the claim. If an action would lie at all at the instance of the covenantee—and I have explained why I think it would not at this stage—the very utmost relief that could be given would be a declaration of his right to be indemnified against any judgment which might be recovered against him. That seems a matter so purely personal to himself that I cannot understand how any one else can maintain action for it. But it is unnecessary to enter further into that question at present.

I am of opinion that the judgment should be affirmed.

MACLENNAN, J. A. :—

Mr. Moss, for the appellants, contended very strenuously that the covenant of indemnity given by Edward Huston was assignable, being a chose in action arising out of con-

Judgment.

MACLENNAN,
J.A.

tract, and that being assigned to the plaintiffs they could sue upon it for their own benefit, and that they could sue the old firm and Edward Huston in the same action. He contended also that the demurrer was in effect a demurrer for misjoinder of parties, and relied upon rules 301 and 324.

To deal first with the question of parties:—I do not think the rules referred to have anything to do with the case. Rule 301 says that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. But that does not dispense with the statement of facts sufficient to shew that all such persons are properly brought before the Court, and unless there is made such a statement of facts any defendant in respect of whom it is defective may demur. Neither does Rule 324 help the plaintiff. That rule merely prevents an action being defeated for misjoinder, and in no way prevents a party from demurring to a statement of claim which makes no case against him.

The really important question, however, is whether as matters stood when the action was commenced the plaintiffs could sue Edward Huston. Mr. Moss relied on *Werderman v. Société Générale d'Electricité*, 19 Ch. D. 246, but that case is clearly distinguishable. The plaintiff was the owner of a patent, and he assigned it with a stipulation that the assignees or their assigns should account annually to the plaintiff for a share of all profits arising from royalties, sale or otherwise. The assignees assigned to the defendant company with notice of the stipulation, and it was held they were bound by it, and bound to account to the plaintiff for the profits and to pay him the stipulated share; that they could not become assignees of the patent without performing the stipulation of which they had notice and to which it was subject in the hands of their assignor.

Mr. Moss also relied on the cases of *Irving v. Boyd*, 15 Gr. 157, and *British Canadian Loan Co. v. Tear*, 23 O. R. 664, in which it was held that the right of a mortgagor who has sold his equity of redemption subject to the mortgage to compel the purchaser to pay off the mortgage debt

was assignable to the mortgagee so as to enable the latter to enforce it for his own benefit. I do not, however, see that the present is necessarily an analogous case. In the mortgage cases at the very time of the assignment there was an obligation to pay an ascertained sum of money, and the moment it was due that moment the purchaser was liable to be sued. Here, however, the liability of the defendant depends on the terms of his covenant. Mr. Douglas' argument was that when this action was brought no cause of action had accrued having regard to the terms of the covenant; that even if Webster, the covenantee, had brought the action it was premature. It therefore becomes necessary to see and consider what the terms of the covenant are. The words used in the statement of claim, which of course is what must govern in the case of a demurrer, are: "At all times to indemnify and save harmless the said Isaac Webster of and from all and every of the liabilities, contracts, and agreements of the firm of Webster & Huston." I may remark that this covenant is exactly the agreement which would be implied between the retiring partner and the new firm without any covenant at all; the allegation being that the latter took over all the assets of the firm of Webster & Huston, *and assumed their liabilities*. Now, if Webster had brought the action could he allege a breach of the covenant? He had not been troubled in any way by the plaintiffs; he had suffered no damage by reason of it. If he had been sued upon it by the plaintiffs, and if judgment had been recovered against him, and if either his former partner or Edward Huston had not satisfied the judgment he could complain. In *Mewburn v. MacKelcan*, 19 A. R. 729, and in *Boyd v. Robinson*, 20 O. R. 404, judgment had been recovered against the covenantee and remained unsatisfied. But here not even an action had been commenced, nor demand made. I do not say that Webster might not have paid before action upon being threatened with one, and then have sued on his covenant, but until he suffered some harm by reason of the contract or agreement with the plaintiffs I think he could commence

Judgment.

MACLENNAN,
J.A.

SEGSWORTH ET AL. V. ANDERSON ET AL.

Assignments and Preferences—Sale of Insolvent's Estate—Secret Profit by Creditor—Inspector—Trusts.

The assets of an insolvent estate were sold by the assignee at a price that was not complained of, to the insolvent's wife, with the approval of the sole inspector of the estate, the inspector and another creditor becoming responsible for the payment of the purchase money, and pursuant to a pre-existing undisclosed agreement taking from the purchaser a chattel mortgage upon these assets as security not only for the amount of the purchase money but also for the full amount of their claims against the debtor :—

Held, per HAGARTY, C. J. O. That the transaction was, legally speaking, an improper one, but that, there being no evidence that any loss had been caused to the estate or any advantage obtained by the defendants, no reference should be directed.

Per BURTON, and MACLENNAN, JJ. A. That the inspector and the creditor could not be ordered to account for the profit, if any, made by them, that profit not having been made at the expense of the estate or by virtue of the office of trust filled by the inspector.

Per OSLER, J. A. That it was not shewn that the best price had been obtained ; that any profit must be accounted for, and that a reference to ascertain the amount thereof should be directed.

In the result the judgment of the Queen's Bench Division, 23 O. R. 573, was reversed.

Statement. THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 23 O. R. 573.

The plaintiffs, John Segsworth & Co., were creditors of one Theodore Jorgenson, who, on the 1st of December, 1891, made a general assignment for the benefit of his creditors, under R. S. O. ch. 124, to the plaintiff Barber. The defendants were also creditors of Jorgenson and the defendant Lee was sole inspector of his estate. The assignee, with the approbation and at the instance of the defendant Lee, sold the assets of the estate at a rate on the dollar to the insolvent's wife, Anderson and Lee guaranteeing payment of the purchase money, and taking from Mrs. Jorgenson, pursuant to a pre-existing undisclosed agreement, a chattel mortgage on these assets to secure them not only against the liability thus incurred by them, but also in the payment of the full amount of their claims against the insolvent. This sale was not in itself com-

plained of, but the plaintiffs contended that the defendants were liable to account for the profit and advantage derived by them from this agreement, and MEREDITH, J., before whom the action was tried, so held, directing a reference to ascertain the amount. Statement.

The Queen's Bench Division, on the defendants' appeal, varied this judgment by ordering them to pay to the assignee the difference between their claims and the dividends received by them from the estate, holding that this was the measure of profit for which they were accountable.

The defendants then appealed to this Court and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 22nd of March, 1894.

S. H. Blake, Q. C., and *E. F. Gunther*, for the appellants. The trial Judge and the Divisional Court have dealt with this case on an entirely erroneous assumption. They have treated it as if a composition agreement had been entered into, and as if the defendants had bargained for a secret benefit before assenting to it. That is the case of *Wood v. Barker*, L. R. 1 Eq. 139, and the principles of law invoked in the Courts below we do not quarrel with. But this case is quite outside them. Here the insolvent and his estate are in no way affected, certainly not prejudicially. The creditors have received the full value of the assets and cannot complain of the entirely collateral transaction between Mrs. Jorgenson and the appellants. The judgment of the Divisional Court is clearly wrong, for the claims have not been paid, and there is no evidence that the assets are of sufficient value to cover even the purchase money advanced by the appellants.

James Parkes, and *L. F. Heyd*, for the respondents. It is clear from the evidence that the sale to Mrs. Jorgenson was not approved of by the defendant Lee in good faith, but was carried through by his influence in order that he

Argument. and Anderson might get the benefit of the pre-arranged security. This arrangement should have been made public, and the creditors should have been given an opportunity of considering it. The principle upon which a creditor obtaining a secret advantage is made to account therefor clearly applies. Moreover, the defendant Lee was a trustee for the creditors generally, and cannot retain a profit made by virtue of his office: *Morrison v. Watts*, 19 A. R. 622; *Thompson v. Clarkson*, 21 O. R. 421; *Eden v. Ridsdales Railway Lamp Co.*, 23 Q. B. D. 368.

S. H. Blake, Q. C., in reply.

April 16th, 1894. HAGARTY, C. J. O.:—

If the creditors or the assignee had sought to set aside the sale of the estate to the wife of the insolvent, shewing a state of facts on which it would be possible to undo the arrangement, notwithstanding its having been so fully acted upon in paying the dividends, I do not see how a Court could refuse to set aside the arrangement entered into.

The actors in the matter have been acquitted by the trial Judge of any intentional moral wrong, and I do not question such a finding.

But I am of opinion that the action of the inspector, occupying a fiduciary position towards the creditors, in not communicating to them the very peculiar dealing by him with the insolvent and his wife, was legally indefensible.

The acceptance of the wife's tender, and the arrangements which led up thereto, and the position assumed by the inspector as to his own claim, were matters which ought not to have been done behind the creditors' back.

The wife's tender was arranged to be made under the agreement as to her securing so far as she could the whole debt of Mr. Lee. This, I think, is clearly deducible from the evidence.

But all this would go towards the setting aside the whole settlement of the estate, which is not asked by the plaintiffs.

Then we have only to see if any loss has been caused to the estate, or whether the inspector or Anderson have by the arrangement succeeded in obtaining for themselves some moneys or property which should have gone to the creditors ratably. If this had been shewn, I think the relief sought should be granted.

Judgment.

HAGARTY,
C.J.O.

A re-examination of the whole evidence convinces me that there is no reason for finding that any loss whatever is shewn, or that any property applicable to creditors' claims could be gotten at by the reference directed by the trial Judge.

I cannot adopt any view of the facts to lead to any such belief.

No evidence is offered by the plaintiffs to suggest the existence of assets withdrawn from the creditors.

I am unable to accept the view of the Divisional Court that, instead of the reference directed by the trial Judge, the defendants should pay to the assignee, for ratable distribution, the amount of the difference between their claims against the insolvent and the amount they would have received by way of dividend in common with the other creditors, being the sum of \$1,496.

This direction seems to me, with much respect, to be unwarranted by the evidence.

I agree with the legal principles laid down by the learned trial Judge, and if I could see any reasonable probability of any benefit whatever to the estate from the reference he directs, I would follow his judgment. As it is, I think we should not direct it, as probably only involving useless expense.

Had the plaintiffs adduced any proof of the allegation in their claim that profit or advantage had been obtained by the defendants available for ratable distribution amongst the creditors, our judgment should be different.

To mark our sense of the irregular character of the dealings with the estate, I think that we should allow the appeal with costs, and dismiss the action without costs.

Judgment. BURTON, J. A. :—

BURTON,
J.A.

I agree to the fullest extent in the judgment prepared by my brother Maclellan.

I think that the estate was sold for its full value, and I agree with the finding of the learned trial Judge that all suspicions of intentional wrong-doing on the part of the defendants were entirely removed, and that they did not intend to violate any principle of law, and although the character which the defendant Lee filled previously to the acceptance of the tender made the transaction somewhat suspicious, an examination of the evidence has satisfied me that no principle of law has been violated; and in cases of this nature, a pretty long experience has satisfied me that a mere case of suspicion ought not to lead us to ascribe anything wrong to the parties whose conduct is impugned. Fraud, or anything which would in law be regarded as fraud, ought to be proved, not surmised. It was imprudent in the defendant Lee to consent to join Anderson in the endorsement, but that was an innocent act in itself, and if he had refused, it strikes me that a considerable loss would have occurred to the estate.

It seems to me that it is quite upon the cards that the indorsers may yet suffer a considerable loss instead of receiving payment of their debts in full. Lee acted upon the advice of his solicitor, and his conduct does not appear to me to be open to any adverse comment, although I quite agree that in cases of this kind a person filling a fiduciary position ought to avoid even the appearance of wrong-doing.

OSLER, J. A. :—

The estate of Jorgenson was the property of his creditors, represented by the assignee who has been added as a party plaintiff to the action. They were entitled to its value as ascertainable in a due course of administration by the assignee under the direction and with the advice and assis-

tance of the inspector, who undoubtedly stood in a fiduciary relation to the creditors in respect of it, and was not entitled without a full disclosure to and assent thereto by the creditors to deal with it in such a manner as to derive therefrom any advantage to himself.

Judgment.

OSLER,
J. A.

On the 8th December, at a meeting of the creditors, a resolution was passed by them in the following terms: "That the estate be wound up as speedily as possible, and that the matter be left to the inspector to decide the terms and security." The defendant Anderson tendered for it at thirty-six cents, and Mrs. Jorgenson at thirty-seven cents, and it was sold to her at thirty-seven cents on the dollar, upon the estimated value of the assets, the defendant Anderson endorsing her notes given therefor to the assignee. It is, in my opinion, proved that this sale was effected in pursuance of an arrangement between the defendant Anderson and the inspector, who were both creditors of the estate, and Mrs. Jorgenson, the debtor's wife, that Anderson should endorse her notes for the purchase money, and that she should give notes to be secured by mortgage upon the property for the difference between the dividend Anderson and the inspector would receive from the estate, and the full amount of their debts; Anderson and the inspector arranging between themselves as to the proportion which the latter should assume of the liability Anderson had undertaken upon his endorsement of Mrs. Jorgenson's notes.

The sale was carried out by the advice and direction of the inspector, but it seems to me to be proved beyond any reasonable doubt that it was so carried out as part of the arrangement I have mentioned, by which Anderson and the inspector were to have their debts paid in full, and the notes given therefor secured by the purchaser's mortgage. The evidence does not admit of the view pressed upon us so forcibly by the appellants, that this was independent of and collateral and subsequent to the sale; the whole was one transaction, and there was no binding agreement with Mrs. Jorgenson apart from security to be given

Judgment.

OSLER,
J.A.

by Anderson, but which would not have been forthcoming, had she not agreed to give the substantial consideration which he and the inspector through him were asking for it.

The result was that without the knowledge or consent of the creditors the inspector of the estate and the defendant Anderson by his aid, by means of the mortgage they stipulated for from Jorgenson, obtained the estate as security for the difference between their dividends and the amount of their debts. There is no objection in principle to a compounding debtor who acquires his estate from, or to whom it is released by, his creditors, and *a fortiori* to the purchaser of the estate from the assignee, assigning the property so acquired to any one, possibly even a creditor, who endorses his composition notes or notes for the purchase money, as indemnity against the liability so incurred, and to secure a substantial compensation for incurring it: *Ex parte Burrell*, 1 Ch. D. 537; *Ex parte Allard*, 16 Ch. D. at p. 512. These cases, however, have not the slightest application to the present. The plaintiffs' title to relief does not rest on the ground that these two creditors have got better terms than their fellow-creditors. Were there nothing more than that in the case the plaintiffs must fail, as I know of no authority for saying that the other creditors can force the preferred creditors to share with them the advantage so obtained by them. Mere inequality, however unjustly obtained, while it may avoid a composition or leave the creditor open to an attack by the repentant debtor, gives the other creditors no rights against him. In this case we are not dealing with a composition between a debtor and his creditors and a secret agreement with one or more of the latter to induce them to come into it. The case rests on this, that there was a dealing with the estate by these two defendants—one of whom, to the knowledge of the other, stood in a fiduciary position in respect of it towards all the creditors—which was not known or assented to by the other creditors, and by which the defendants obtained or may obtain out of the estate, to the extent of any value there may be in it

over and above what it was sold to Mrs. Jorgenson for, some secret advantage or profit for themselves.

Judgment.

OSLER,
J.A.

The inspector, in short, procured or authorized the estate to be disposed of on the footing of a private arrangement between himself and his co-defendant and the tenderer Mrs. Jorgenson, that if the latter became the purchaser she should assign the estate as security for so much of their debts as was not covered by the dividend they would receive out of the purchase money. This is the transaction which the learned trial Judge finds established, and I think is fully established, by the evidence. I do not see upon what principle the defendants can resist the claim of the assignee that they should be ordered to account for any profit or advantage which they may have thus obtained. The measure of that profit is the difference between the price at which the estate was sold to Mrs. Jorgenson and its real value at that time. The evidence is sufficient to justify the reference ordered by the trial Judge, whose decree should, however, be so far modified as to make the limits of the reference clear. The judgment of the Queen's Bench Division goes too far, as it is very unlikely that the profit and advantage which the defendants will derive from the estate, which is the utmost extent of their liability, will be so much as the difference between the amount of Jorgenson's debt to them and the amount of the dividend they may receive in common with other creditors out of Mrs. Jorgenson's purchase money.

The appeal should be allowed and the judgment of the trial Judge restored with the modification I have suggested: The plaintiffs must pay the costs of the appeal.

MACLENNAN, J. A. :—

But for the fact that the defendant Lee was the inspector of this estate, and therefore in a position of trust towards the creditors, I should have been clearly of opinion that this action is not maintainable. I am not aware of any principle, or of any authority, which prevents a creditor in such a case from buying the trust pro-

Judgment.
MACLENNAN,
J. A.

perty from the trustee, either openly, or secretly through an agent, as freely as a stranger. If he may, it follows *a fortiori* that he may make any bargain he pleases, either secretly or openly, with any other person who becomes such a purchaser, to assist him in his purchase, either by a loan of money, or by becoming his surety or otherwise. Of course, this is always assuming that he has been guilty of no fraud or evil practice in bringing about the sale either to himself or to another. In the present case the sale itself is not attacked. It is not pretended that there was any undervalue, and the evidence is uncontradicted that no better sale could be made, no better price could be obtained. The learned trial Judge says there is no sufficient reason for discrediting or doubting the evidence of the defendants, and adds: "There were circumstances in connection with the appointment of the sole inspector, and with the tenders and the transactions otherwise, enough to put a suspicious mind upon inquiry, and, perhaps, to call for a clear explanation from the inspector; but, upon the whole evidence, I am bound to say, that all suspicions of any intentional wrong-doing are quite removed—that the defendants did not intend to violate any principle of law; indeed, that they were, and more particularly the inspector was, anxious to avoid doing so; though each was willing and anxious to advance his own interests and to take advantage of the existing state of affairs to benefit himself in so far as he thought, or was advised, he lawfully might."

Therefore, this is the case of a sale by the trustee for creditors of the trust property fairly and openly made for its full marketable value, not brought about by any fraud or evil practice by the defendants, and on which the defendants, for a consideration moving and proceeding exclusively from the purchaser, and in no way affecting the rights or interests of the trust estate, or of the other creditors, agreed to become the purchaser's sureties for the payment of the purchase money. There is no analogy that I am able to perceive between this case and that of a composition deed between a debtor and his creditors, where

a secret advantage to himself beyond what is expressed in the deed stipulated for by one creditor is a manifest fraud upon all the others. The learned trial Judge has cited *Wood v. Barker*, L. R. 1 Eq. 139, where, in the case of a composition deed under the Bankruptcy Act, one creditor by arrangement with the debtor secretly stipulated to be paid in full in consideration of guaranteeing the composition. The statute made the deed binding on all creditors by reason of the assent thereto of three-fourths in number and value; and it was sworn that many would not have agreed if they had known, believed, or suspected that the defendant was to be paid in full; and one creditor swore that before he assented the defendant had informed him by letter that he was to receive the same as the others and no more.

Judgment.
MACLENNAN,
J.A.

It is plain, therefore, that this case is no authority for the plaintiffs.

The learned trial Judge has, however, cited another case, which, I think, is very apposite, viz., *Ex parte Burrell*, 1 Ch. D. 537. That also was a case of a composition deed, in which one of the creditors became surety for the composition, but stipulated for security on the debtor's goods against his suretyship, a stipulation which was not made known to the creditors. In delivering his judgment, which was afterwards affirmed by the Court of Appeal, Bacon, C. J., says: "If the assets belonged to the debtor, as they did by law, he had a right to deal with them as he chose, and a right to buy from the surety the liability under which he had come. * * The creditors having had * * all that by the composition resolutions they stipulated for, now say, they are entitled to more than that, for the debtor, being master of his property, has applied part of it for the purpose of securing to them the third instalment which he promised to pay. Nothing can, in my opinion, be more repugnant to justice and common sense than the claim at present set up." And, again, speaking of the charge of secrecy, he says: "But to what end should it be disclosed? The rule which vitiates a

Judgment. composition on the ground that faith has not been kept
MAOLENNAN, with the creditors has no application to this case. Where
J.A. is the want of good faith, or the concealment of a fact which would have bettered or altered the position of the creditors if it had been known? What advantage did the surety derive from this? He gave his money for goods worth so much money. The creditors have had every particle that could be produced by the assets."

This judgment was unanimously affirmed by the Court of Appeal, and they point out that by the agreement for composition the debtor was left perfectly free to use his goods wherewith to procure a surety.

In the present case there is no question with the debtor. He remains liable to all for the deficiency. What is found fault with is a dealing with the purchaser. She made a fair bargain, which is not and could not be impeached. The goods became hers and she has used them, as she had a right to do, to procure the security which the contract called for. She could agree to give a sum of money as a consideration for the suretyship which she required; and if so, why could she not agree to pay part or the whole of the deficiency of her husband's debt for it? I see no reason in the world why she should not do so, or why any one or more creditors of her husband or her estate should not make that arrangement with her, and make it without disclosing it to the other creditors, if they chose to keep it to themselves.

Then what, if any, difference does it make that the defendant Lee was inspector of the estate? His being inspector made him a trustee, with all the duties and liabilities which the law attaches to that office. The trust property has been sold, and the sale is not impeached. The trustee on behalf of the creditors has received full payment of the price. What more are they entitled to? If the trustee has been guilty of any wilful neglect or default to the injury of the estate, he must make good the loss or damage; or if he has made a profit out of his office, he must share it with the other persons interested.

There is no neglect or default charged ; but it is alleged that Lee has made a profit out of his office. It is said that by virtue of his office he has actually obtained payment of his whole debt, and not merely of a ratable proportion, the same as the other creditors. The learned trial Judge decided that he had made a profit, but directed a reference to ascertain its amount, while the Divisional Court went farther, and held that he was accountable for the whole balance of his debt as if he had actually received payment, and has even made each defendant liable for the supposed profit made by the other. As I have already said, I do not see how the defendant Anderson can be held liable for anything, and I think that as against him the action ought to be dismissed ; but if the defendant Lee has made a profit out of his office, he must account for it. The question is, has he done so. As inspector of the estate he was in effect in the same position as the assignee; he was a trustee vendor.

Judgment.

MACLENNAN,
J.A.

If under these circumstances he had secretly become the purchaser, the assignee or the creditors on finding it out could either set the sale aside, or could affirm it, and require him to account for the profit made on a re-sale, as being clearly a profit made out of his trust ; and if he could not himself become the purchaser without accounting for profit, can he bargain with a stranger who has purchased from him, to assist the latter in his financial arrangements for carrying out the sale, and to receive compensation for so doing for his own benefit ? To take a simple case : a trustee sells property for its full value, and the money is to be paid on a certain day ; when the day arrives the purchaser has not the money, and he asks the trustee vendor to advance it to him by way of a loan at interest and for a commission, which he does, must he account to the trust for the interest and the commission ? Or suppose the purchaser asks the trustee to endorse his note at the bank for a commission to enable him to procure the money, is the commission profit made out of his trust ? The profit is closely connected with the trust in both cases.

Judgment. but yet I know of no case which goes so far as to hold
MAOLENNAN, that in either case it would be a profit made out of his
J.A. trust for which the trustee would be accountable. Unquestionably in such cases the risk is the personal and private risk of the trustee. He gives value for the commission received. No part of the value is given by or derived from the trust ; and it seems to me that the profit cannot be said to arise or to be derived from the trustee's office within the meaning of the rule in equity or the decisions thereon.

The trust does not give rise to the profit, but merely to the transaction or occasion out of which it arises. I admit the cases supposed are near the line, but I think they are outside of it. Then does the present case differ from these which I have supposed ? I am unable to see that it does.

The contract of sale was for a certain price to be paid in instalments with security. The security offered was the endorsement of Anderson & Co. That was accepted, and its perfect sufficiency never was doubted or questioned. When that was agreed to, the full benefit and advantage of the trust estate was ensured to the creditors. But how about Anderson ? He had agreed to become surety. The other creditors were made safe in their dividends, but not he. He was taking the risk not only of his own dividend, but of those of the others. As I have said, I think he had a right to stipulate with the purchaser either for security or reward or both for this risk ; and to take it in the form of an agreement for the payment of the deficiency of his claim on the debtor's estate. It seems that at first Anderson intended to assume this risk alone, but afterwards, becoming somewhat alarmed, applied to Lee to join him in the risk on similar terms, to which he agreed, and the instrument which was drawn up in effect made the defendants as between themselves co-guarantors of the purchase money in proportion to their respective debts, in consideration of the purchaser agreeing to pay the deficiency and giving a chattel mortgage as security for that, and to indemnify Anderson & Co. against their liability as

endorsers. Now, I think that this agreement with the purchaser was a separate and independent transaction, and one which, while closely connected with the trust, was, nevertheless, not a part of it, nor related to it, so that it can or must be said that the consideration or profit derived therefrom by Lee ought to be accounted for by him to his *cestuis que trust*. The case of *Eden v. Ridsdales Railway Lamp Co.*, 23 Q. B. D. 368, cited by the respondents, is a very good illustration of a profit made by a trustee out of his office, for which he must account. There a director of a company received a present of 200 paid up shares from a person with whom the company at the time had a very large business transaction. But the case is no authority for supporting the judgment now before us.

Judgment.
MACLENNAN,
J.A.

I think, therefore, the case fails as against the defendant Lee, as well as against the defendant Anderson.

I think, too, that if one must have found Lee liable, he could not be properly charged with the full amount of his debt, whether he had succeeded in recovering it or not. The most he could be charged with would be with his interest in, or with what he had or might or could have realized out of, the chattel mortgage given by Mrs. Jorgenson to Anderson & Co., beyond his ratable dividend on his debt; and after being duly indemnified against his proportion of the suretyship for the creditors. To charge him as the order made by the Divisional Court does, would be to inflict a penalty on the trustee, which the Court never does: Lewin's Law of Trusts, 8th ed., p. 341; *Attorney-General v. Alford*, 4 D. M. & G. at p. 851; *Vyse v. Foster*, L. R. 8 Ch. at p. 333, L. R. 7 H. L. 318.

The appeal should, therefore, be allowed, and the action should be dismissed.

Appeal allowed with costs.

IN RE MCCOLL AND THE CITY OF TORONTO.

Municipal Corporations—Arbitration and Award—Withdrawal—49 Vic. ch. 66 (O.)—46 Vic. ch. 18, secs. 393, 404 (O.).

Sub-section 6 of section 1 of 49 Vic. ch. 66 (O.) (The Don Improvement Act), makes applicable to an arbitration under that Act all the provisions of the Consolidated Municipal Act of 1883 as to arbitrations, including section 404 which enables the council to refuse to ratify the award, and not merely the provisions for determining the amount of compensation, OSLER, J.A., dissenting on this point.

Per OSLER, J.A.—Though the wording of sub-section 6 of section 1 of 49 Vic. ch. 66 (O.), is not wide enough to give the council this power, yet such power may be exercised, for the land expropriated under the Don Improvement Act is real property entered upon, taken or used by the corporation in the exercise of its powers within the meaning of section 393 of the Consolidated Municipal Act of 1883, 46 Vic. ch. 18 (O.), so that section 404 applies.

Judgment of ROSE, J., reversed.

Statement. THIS was an appeal by the city from the judgment of ROSE, J.

The sole question was whether, under the provisions of the Don Improvement Act, 49 Vic. ch. 66 (O.), the city could withdraw from an arbitration. ROSE, J., held that sub-section 6 of section 1 of that Act introduced all the clauses of the Municipal Act of 1883 applicable for settling and determining every dispute and claim, but not section 404 which confers the power of withdrawal. There had been no entry on the lands.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 28th of March, 1894.

W. R. Meredith, Q. C., for the appellants. It is contended that sub-section 6 of section 1 of the Don Improvement Act does not introduce the clauses of the Consolidated Municipal Act of 1883 allowing withdrawal but merely the machinery for arriving at the value. But this is quite too narrow a construction. Apart from actual entry on the land it is clear that notice to treat creates no contract, but merely gives a right to take the statutory proceedings.

Suit could not be brought without shewing an award, and a by-law making that award binding on the corporation, for the Municipal Act says that no award without by-law shall be binding. There is merely a system of procedure for ascertaining the cash value with a power to desist on payment of costs. A power of this kind is given to railways, and it is an important right for the protection of ratepayers. Of course entry makes desistment impossible. Section 486 making payment of compensation compulsory throws some light on the point. That section says that the claim is to be ascertained by arbitration under this Act. This clearly introduces all the machinery and incidents in the Act provided, and the language is precisely the same in the special Act now in question, which was rendered necessary because of the mode of assessing the cost, but by it there is no obligation to expropriate any particular land within the described area. Sections 403 and 404 must be adopted as part of the arbitration machinery. It is not reasonable to stop short at the mere ascertainment of the amount without reading in the clauses relating to the effect of the award, which is part of the process of ascertainment. The heading of the Municipal Act is "Arbitrations," and all must be included under the expression used: *Hardcastle*, 2nd ed., p. 227; *Wood v. Hurl*, 28 Gr. 146. Section 404 comes under the sub-head "Procedure," and clearly deals with part of the machinery of the arbitration and not with something entirely subsequent.

Argument.

Lash, Q. C., for the respondent. As soon as notice was served there was a binding contract from which, without legislative sanction, no withdrawal was possible: *Moore v. Central Ontario R. W. Co.*, 2 O. R. 647. This is on the principle that the giving of the notice in effect creates an encumbrance and prevents the owner from dealing with the land: *Birch v. Vestry of Marylebone*, 17 W. R. 1014; *Steele v. Corporation of Liverpool*, 7 B. & S. 261. The only provisions introduced are time for settling and determining the amount, that being the only dispute:

Argument. *Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse*, 16 S. C. R. 606 ; *In re Wakefield and Wakefield Union*, 4 Times L. R. 561.

W. R. Meredith, Q. C., in reply.

May 8th, 1894. HAGARTY, C. J. O. :—

It is conceded that the whole question in dispute is whether section 404 of the Consolidated Municipal Act of 1883 as to arbitrations gives power to the city to repeal by-law 2749.

Under this by-law certain lands of McColl were proposed to be expropriated for what was called the Don Improvement matter. Not being able to agree on the value the parties proceeded to arbitration before His Honour Judge Morson, and witnesses were examined.

Before the city's case was entered upon, notice was given that the Council would repeal the expropriating by-law, and on the 23rd of May, 1892, by-law No. 3070 was passed repealing by-law No. 2749 so as to stop the arbitration proceedings to determine the damages.

Notice of the intended repeal was given to McColl with an offer to pay his costs. He protested against this.

On application to Mr. Justice Rose the repealing by-law was quashed, the learned Judge holding that the corporation had no power to repeal, and that section 404 did not apply. The city appeal to us.

The Don Improvement Act, 49 Vic. ch. 66 (O.), permits the expropriation of lands, and section 1, sub-section 6, directs that in case of dispute or disagreement as to the amount of compensation between the city and the owners, every such dispute and claim shall be settled and determined by arbitration under the provisions of the Consolidated Municipal Act, 1883, and amendments thereto, if any, in that behalf.

Section 2 directs the assessment of the lots according to the plans and surveys, and the ascertainment of the proportion of total cost and interest chargeable in

respect of each lot, and the council are to proceed as in assessing for local improvements under the provisions of the Consolidated Municipal Act, 1883.

Judgment.
HAGARTY,
C.J.O.

Again, in section 4, sub-section 3, the Municipal Act is referred to as to special assessments for improvements.

Section 5 directs the vote to be taken of the ratepayers under the provisions of the Municipal Act.

Section 404 of the Municipal Act of 1883, declares that in the cases referred to, "the award shall not be binding on the corporation unless it is adopted by by-law within six weeks after the making of the award, and if the same is not so adopted, the original by-law shall be deemed to be repealed, and the property shall stand as if no such by-law had been made, and the corporation shall pay the costs of the arbitration."

Large powers are given to the High Court of Justice to deal with the award on the merits and otherwise, etc. The same provisions are contained in the subsequent municipal Acts under the same head of "Procedure."

I am unable to agree in the view taken by my brother Rose. After noticing the reference to the Municipal Act he says :

"This section clearly introduced all clauses applicable for settling and determining every dispute and claim, and the award is the final act settling and determining. But it was argued for the applicant that section 404 (which is a provision for something after the award) cannot be invoked because it in no wise provides for settling and determining, but for unsettling or perhaps better for doing away with the award which settled and determined.

I have come to the conclusion that this contention is correct, and that the provisions of section 404 were not introduced by the words of sub-section 6 of section 1 above quoted."

When the Legislature directed a "dispute to be settled by arbitration" under the provisions of an Act regulating such arbitration and the procedure to govern the same it seems to me that this direction is not to be limited to the

Judgment.
HAGARTY,
C.J.O.

mere making of the award, so that when the award is made the reference to the Municipal Act is exhausted.

The procedure clauses from 399 to 405, both inclusive, provide for the oath to be taken by the arbitrators, the times of meeting, awarding of costs, majority to govern, taking of evidence, as to binding effect depending on action of the corporation; and lastly, section 405, that the award is to be in writing under the hands of all or two arbitrators, and to be subject to the jurisdiction of the High Court as to its legality and merits, with power to call for further evidence, remit back for further consideration by the same or other arbitrators, etc., etc.

I am of opinion that all these procedure clauses are to govern the arbitration resorted to to settle the dispute in this case, and that the powers given to the corporation to defeat the award, or rather to refuse to ratify it on payment of costs, are necessarily applicable to this case.

I consider that such powers as well as the powers of the High Court to set aside or modify any award are necessarily part of the whole arbitration procedure under the Municipal Act. The Legislature, in effect says: "You must settle your dispute by arbitration as under the Municipal Act, and any award must be conducted and finally dealt with whether binding or not as thereby provided."

The power given to a Municipal Council to back out of an arbitration to fix compensation seems to me a most wholesome provision and should not be lightly interfered with.

An alleged improvement is proposed requiring the purchase of property. On investigating the amount of compensation it is discovered to be far beyond the estimate originally supposed of the cost. The corporation then find that the proposed "improvement" is too costly. For the protection of the ratepayers they resolve to abandon its further prosecution, paying the expenses of the other party to the compensation proceedings.

I think the appeal must be allowed.

BURTON, J. A.:—

Judgment.

BURTON,
J. A.

I think, with great respect, that the Court below has taken too narrow a view of the effect of sub-section 6 of section 1 of the recent Act making special provision for, *inter alia*, expropriating lands for the improvement of the Don river.

The general scheme of the Municipal Act applying to all corporations is to be found, in what I may speak of as a code for the regulation of all arbitrations, in Title 4, in two sub-divisions, one regulating and providing for the appointment of arbitrators, the other for procedure. In the latter of these divisions is a provision which has now for a long series of years been found to be most beneficial, viz., that where the award relates to property to be taken or used and no entry has been made except for the purpose of survey, the award shall be of no validity, unless adopted by by-law within six weeks after the making of the award; thus giving to the governing body of the municipality a *locus pœnitentiæ* in case the amount awarded should prove to be largely in excess of the sum estimated, or other good and sufficient reason, or without assigning any reason.

It is scarcely conceivable that the city in promoting this special legislation intended to deprive itself of so valuable a privilege, but whatever its intention, its powers must now be regulated by the words used. I can see no reason for giving any restricted meaning to the words they have employed: "Every such dispute and claim shall be settled and determined by arbitration under the provisions of the Consolidated Municipal Act." Why should some of these provisions be arbitrarily selected and others rejected? To my mind what was intended was that in the event of arbitration being resorted to the machinery provided by the Municipal Act was to govern the proceedings.

If otherwise, those provisions relating to the powers of the High Court to set aside or modify the award would also be inapplicable as not coming within the words "for

Judgment.
BURTON,
J.A.

settling and determining," or, in other words, something antecedent to and including the award.

I think the Legislature very clearly intended to import into this Act all the provisions embraced in Title 4. The action of the council in repealing the by-law was, as it seems to me, quite unnecessary, as the award could have no validity till approved of; but it was understood that that objection was not to be raised if the Court should be of opinion that section 404 of the Act of 1883 applied.

I am of opinion, therefore, that the appeal should be allowed, and I see no reason why the appellants should not have their costs.

OSLER, J. A. :—

The practical question raised for decision in this case is whether an award of compensation for lands taken under the authority of a by-law passed under the special provisions of the Act respecting the city of Toronto relating to the Don Improvement, as it is called, 49 Vic. ch. 66 (O.), is one which requires adoption by the council under section 404 of the Consolidated Municipal Act of 1883 before it becomes binding upon the corporation.

The expropriating by-law, No. 2749, was passed in exercise of the powers conferred by the special Act; section 1, sub-section 6, of which, enacts that in case of disagreement between the council and the owners of lands entered upon, taken or used by the corporation in the exercise of such powers, as to the compensation to be made therefor, every such dispute and claim shall be settled and determined by arbitration under the provisions of the Consolidated Municipal Act, 1883, and amendments thereto. The parties were unable to agree, and on the application of the city an order was made on the 13th of June, 1891, by a Judge of the Court of Appeal, under 52 Vic. ch. 36, sec. 21 (O.), the Municipal Amendment Act, 1889, appointing a sole arbitrator to determine according to law the amount of compensation and damages to be paid to McColl. The arbitration was proceeded with for some time when the corporation finding the

amount of compensation which McColl was attempting to fix upon them exceeded anything which they had anticipated, passed a by-law to repeal the expropriating by-law. Such a by-law, if the award be one which requires adoption by the council, is in strictness unnecessary, but it was passed with the legitimate object of avoiding the further costs of a prolonged and expensive arbitration, and by consent the question is raised on a motion to quash the repealing by-law, which is undoubtedly invalid if the award would be binding on the council without adoption, as would of course be the case if section 404 of the Consolidated Municipal Act of 1883 does not apply.

Judgment.

OSLER,
J.A.

That section enacts that in case the award relates to property to be entered upon, taken, or used by the corporation in the exercise of any of its powers, or injuriously affected thereby, and in case the by-law did not authorize, or profess to authorize any entry or use to be made of the property before an award has been made except for the purpose of survey, or in case the by-law did give, or profess to give, such authority, but the arbitrators find that such authority had not been acted upon, the award shall not be binding on the corporation unless it is adopted by by-law within three months after the making of the award, and if the same is not so adopted the original by-law shall be deemed to be repealed and the property shall stand as if no such by-law had been made, and the corporation shall pay the costs of the arbitration.

This by-law does not expressly authorize an entry to be made on the property for the purpose of taking possession before the making of the award, and possession has not, in fact, been taken.

The argument for the appellants was that the effect of sub-section 6 of section 1 of the Act of 1886, enacting that "Every such dispute or claim shall be settled and determined by arbitration under the provisions of the Consolidated Municipal Act, 1883," introduced all the clauses of that Act under the title "Arbitrations" (sections 387 to 405), and among others, section 404 above quoted,

Judgment.

**OSLER,
J.A.**

which enables the council to abandon an expropriating by-law in the cases therein specified by simply declining to adopt the award.

If, however, the power of the council to recede from or abandon the award depended upon the construction to be placed upon the language of sub-section 6, I should be clearly of opinion that they had no such power. To abandon the expropriation after the power to make it has been exercised, requires in municipal as in railway expropriations express legislative authority, and I confess myself quite unable to understand how an isolated provision that disputes as to the amount of the compensation to be paid for lands or damages shall be settled or determined by arbitration under the provisions of the Municipal Act can draw in a special power—which is no part of the procedure on the arbitration—to abandon the expropriation, and annul the determination of the dispute. The clause would be fully satisfied by the application of all the provisions strictly relating to the arbitration, the appointment of the arbitrators, and the procedure at the arbitration as to taking the evidence and otherwise, and the appeal from the award. I therefore think my learned brother Rose's judgment upon the case as presented to him as to the construction and effect of the particular clause of sub-section 6 was right.

There are, nevertheless, other considerations which lead to the conclusion that section 404 of the Municipal Act applies. The special Act is merely an extension for the purposes therein mentioned of the expropriating power which this municipality possesses under the general Act in common with all other municipalities, and even in the absence of sub-section 6, the provisions of section 393 of the general Act would apply, as the land, though taken under the power conferred by the special Act, is, nevertheless, real property entered upon, taken or used by the corporation in the exercise of its powers within the meaning of, and as expressed in, that section. Section 404 may well be held to be of universal application without the aid of sub-section 6 of section 1 of the special Act, or rather in spite

of the apparent limitation of that sub-section, enacting as it does, that "in case the award relates to property to be entered upon, taken or used as mentioned in section 393," i. e., in the exercise of the powers of the corporation, the award shall not be binding except under the circumstances in section 404 provided for.

Judgment.

OSLER,
J.A.

The fact of the special Act providing that a dispute as to compensation shall be settled by arbitration under the Municipal Act, cannot, it seems to me, render the provisions of section 404 less of general application than they would have been if the special Act had made no allusion at all to the mode of determining the dispute. It would have applied just as section 486 must apply, which enacts that the council shall make compensation for lands taken or injuriously affected by the exercise of its powers. We cannot suppose that the Legislature intended to place the municipality in a different position in exercising their powers of expropriation for the purposes of the special Act from that which they would enjoy in exercising them for the purposes specified in the general Act; in other words, the provisions of the general Act, so far as possible, and so far as they are not expressly excluded or inconsistent, must be applied in the exercise of the additional municipal powers conferred by the special Act. For these reasons, I think, that the by-law ought not to have been quashed, as the council could practically have attained the result which it arrived at by declining to adopt any award which might be made under the by-law which it repealed. As we were informed that the proceedings were a matter of arrangement between the parties, the appeal, though allowed, should, I think, be allowed without costs.

MACLENNAN, J. A. :—

I agree with my brother Burton.

Appeal allowed with costs.

IN RE STAEBLER, STAEBLER V. ZIMMERMAN.

Will—Legacies—Charity—Marshalling—Abatement—Executors and Administrators—Evidence—Corroboration—R. S. O. ch. 61.

Though there can be no marshalling in favour of charities, yet where charitable and other legacies are payable out of a mixed fund, the proceeds of realty, impure personalty and personalty, the charitable legacies do not fail *in toto*, but must abate in the proportion which the sum of the realty and impure personalty charged with charitable gifts bears to the pure personalty.

The evidence of executors that promissory notes belonging to the testator had, when they came into their hands, endorsements upon them shewing that payments had been made to him, does not require corroboration under section 10 of R. S. O. ch. 61.

Judgment of FERGUSON, J., reversed.

Statement.

THIS was an appeal by the defendants from the judgment of FERGUSON, J.

The action was brought for the administration of the estate of John George Staebler, who died in 1874. By his will, made on the 1st of June, 1874, he directed that his debts, and funeral and testamentary expenses should be paid by his executors within a convenient time after his decease, and then after making certain specific bequests and devises, he gave to his executors a farm, together with all other real and personal estate and effects, upon trust (so far as it is material to state the trusts) to pay out of the proceeds a legacy of \$2,500 to his wife, two legacies of \$100 each to two charities, and the balance in equal portions to each of his children on attaining the age of twenty-one years. The property comprised in this trust was approximately \$8,200 proceeds of the land; \$4,300 invested in mortgages; \$2,100 in promissory notes; and about \$1,000 in farm implements and stock, the value of the realty and impure personalty being thus \$12,500, and of pure personalty \$3,100. The executors paid the two legacies of \$100 each to the charities in full, and the payments were allowed to them by the Master in their accounts, but on appeal FERGUSON, J., held that the legacies failed *in toto*, being charged upon a mixed fund.

The executors in cross-examination on their accounts,

swore that on certain of the promissory notes belonging to the testator that came into their possession, endorsements had been made in his writing stating that payments on account of the notes had been made to him by the maker in his lifetime, and they accepted from the maker the balance due on this basis. The notes in question had been given up to the maker, who could not be found to give evidence. The Master adopted the executors' view of the matter, but on appeal FERGUSON, J., reversed this finding on the ground that the evidence of the executors required corroboration. Statement.

The executors appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 23rd of April, 1894.

C. Robinson, Q. C., and *A. Monro Grier*, for the appellants. As there was some pure personalty available for the payment of these charitable legacies the learned Judge was wrong in disallowing them *in toto*. There should have been at most merely a proportionate abatement as is pointed out in *Ostrom v. Alford*, 24 O. R. 305. To require corroboration of the executors' evidence as to the endorsements is to entirely misapply the Evidence Act, R. S. O. ch. 61. The section is intended to apply to cases where one party to the particular transaction in question has died, and to protect his estate against improper claims. Here, however, the executors are not interested or opposite parties, but as representing the estate of the testator are supporting on behalf of that estate the compromise or settlement entered into by them, and the only dispute is as to a matter arising after the testator's death, namely, whether there were or were not after his death endorsements on the notes in question.

J. P. Mabee, and *R. T. Harding*, for the respondents. The fund out of which the legacies were to be paid was clearly a mixed fund, and as there can be no marshalling in favour of a charity the payment of the legacies cannot

Argument. be allowed: *Brook v. Badley*, L. R. 3 Ch. 672. The issue on the question of endorsements is between the beneficiaries of the estate and the executors representing their individual interests so that there is a direct conflict of interest, and clearly the executors are interested and opposite parties within the meaning of the section. It is a fallacy to say that the dispute relates to a matter arising after the testator's death. The real question is whether the testator did or did not make these endorsements.

C. Robinson, Q. C., in reply.

May 8th, 1894. OSLER, J. A.:—

On the appeal of the executors as to item No. 6 of the dispute notice, namely, the two sums of \$100 each bequeathed by the testator and paid over by the executors to the Missionary Society of the Evangelical Association of the Canada Conference and the Missionary Society of the Evangelical Association of the German Conference, the question is one not of marshalling, as it seems to have been treated in the Court below, but of apportionment. The payments have been disallowed altogether on the ground that the legacies, being given to charities and payable out of a mixed fund, consisting partly of realty and partly of personalty, were invalid and failed altogether, as there could be no marshalling in favour of a charity.

Marshalling is not admitted in favour of charities, but the bequests ought to be apportioned, as my learned brother MacLennan has explained, according to the values of the real and mixed estate and personal estate of the testator. The recent case of *In re Hill's Trusts*, 16 Ch. D. 173, may be referred to. I agree, for the reasons he has stated, that the appeal as to these sums must be allowed.

There is a further appeal from the reversal of the Master's disposition of the item which has been spoken of as the Young notes, No. 1 of the surcharge. These notes, as part of the testator's estate, came

into the hands of the executors, and they subsequently settled with the maker for an amount considerably less than the face value. It is now attempted to charge them with the difference. Although the Master has not, perhaps, expressly found the fact on which the executors rely as an answer to the surcharge, it is evident that he could not have found, as he has done, in their favour, unless he had believed the account given by them of the reason why they settled with the maker for the amount they accepted from him as the balance due on the notes, which consisted in the simple and intelligible explanation that when the notes came into their hands they bore certain endorsements of payments having been made thereon in the handwriting of their testator. The notes themselves are lost or destroyed, as might be expected to be the case, as the settlement took place many years ago, and the maker has left the country or cannot be found.

Judgment.

OSLER,
J.A.

It was very urgently pressed upon us that the executors' evidence on this point was not worthy of belief, as they had been examined several times, but had never, as it was contended, expressly said anything about the endorsements on the notes until the last moment, when they saw, as was suggested, the necessity of making a more elaborate explanation, and giving a more detailed statement of the reason for settling with Young for less than the full value of the notes than they had at first done.

This view was adopted by the learned Judge below, and he reversed the Master on this point, and has charged the defendants with the full amount of the notes. With all respect for my learned brother, I am of opinion that the defendants' evidence is not open to the criticism which has been made upon it. On the acting executor being first examined, he stated in cross-examination that the settlement was for the balance due on the notes. Counsel who had him in hand, might have pressed him for an explanation as to that had he thought proper, but did not do so, and thus from time to time the examination proceeded till it occurred to

Judgment.

OSLER,
J.A.

some one to enquire what was meant by balance, and then the explanation was given that it was what remained due upon the notes after crediting the payments endorsed thereon by the testator. I cannot regard the so called inventory as in any way reducing the force of this evidence. It was not in the handwriting of the executors, and the word paid, which is so much relied on, is entered in a column headed interest. It is an incomplete, informal instrument, and in several respects unintelligible and inaccurate. On the question of fact, I should, at this distance of time, adopt the executors' evidence and accept the Master's finding and holding thereon.

But it is said that it requires corroboration. With all respect, I cannot agree to that. Section 10 of the Evidence Act, R. S. O. ch. 61, enacts that in any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

What the executors were proving here in order to excuse themselves from the surcharge was the condition in which this particular asset of the testator came into their hands; that it came to them out of the possession of the testator, bearing endorsements of credits thereon, which shewed that the full amount apparently secured thereby had been reduced by payments made to the testator while he was the holder. It was not necessary for the executors to go further and to prove that the payments had in fact been made. That was not the subject of his evidence. They were testifying to matters occurring after the death of the testator, and if their evidence was believed, it did not require corroboration.

The executors thus succeed on both appeals, and I can see no reason why they should not have the costs of this Court and of the Court below. As to the charges with

which these appeals are concerned, they are of so trifling a nature, that after the lapse of nearly twenty years, the litigation may be almost stigmatized as vexatious, and it is to be hoped that the parties having the conduct of the reference will see that a further enquiry into the question of the legacies will be unproductive of anything but costs, which may not improbably in the end fall upon themselves.

Judgment.

OSLER,
J.A.

MACLENNAN, J. A.:—

I think the appeal as to the charitable legacies should be allowed.

The payment of these legacies was allowed by the Master, and that part of the report was appealed from on the ground that the legacies were void altogether, and such was the judgment of the learned Judge.

Now, the rule of law in such cases is clearly settled to be that where charitable gifts, which are void as charges upon realty or impure personalty, are charged upon a mixed fund, such as we have here, they must abate in the proportion which the sum of the realty and impure personalty so charged bears to the pure personalty: *Williams v. Kershaw*, 1 Keen 274 (n); Tudor's Law of Charitable Trusts, 3rd ed., pp. 59, 60; Tudor's Leading Cases on Real Property, 3rd ed., pp. 561, 562; Seton on Decrees, 4th ed., pp. 589, 590. Therefore, the legacies in question are not void, but are merely subject to abatement. The above references shew that in order to ascertain the exact proportion of abatement the debts must first be charged against the general personal estate, both pure and impure, with this exception, that any mortgage debts are primarily chargeable on the respective lands comprised in the mortgages: R. S. O. ch. 109, sec. 37; there being no contrary intention expressed in this will. The pure and impure personalty must bear the debts proportionately. The amount of the realty and impure personalty on the one hand, and of the pure personalty on the other, after

Judgment. payment of debts, being thus ascertained, the charitable
MACLENNAN, legacies must suffer an abatement in the proportion of the
J.A. one to the other. It may be added that if any of the debts of the testator were charged by mortgage upon the farm, such debt or debts must be deducted from the value or proceeds of the farm for the purpose of the abatement.

It was contended by Mr. Mabee that when a testator charged charitable legacies upon a mixed fund of realty or impure personalty, and pure personalty, such legacies were void altogether, and *Brook v. Badley*, L. R. 3 Ch. 672, was cited for that proposition; but that is clearly not so. In that case the testator was himself only a legatee, and his legacy was charged upon mixed funds, and that being the case, it was in his hands impure personalty, which he could not bequeath to charity without violating the statute.

This part of the appeal must, therefore, be allowed, and the executors will be charged only with the excess beyond the proper proportion paid by them to the charities, but without interest.

The other branch of the appeal concerns three promissory notes made by one Philip Young, which belonged to the testator at the time of his death. The face value of the notes was \$275. The testator died in 1874, and in their schedule of the personal estate annexed to their affidavit verifying their accounts, sworn on the 3rd of March, 1893, the executors refer to these notes thus: "Item 9. Three promissory notes of Philip Young, one for \$125; one for \$50; and one for \$100; amounting with interest to \$296.82. On these notes only \$89 was collected, the balance being uncollectable." This sum of \$296.82 is evidently taken from an inventory of the testator's estate prepared soon after his death by two persons named Switzer and Morlock, in which these three notes are inserted, with the amount of the principal and interest thereon, the principal and interest being stated separately. There is no mention in this inventory of any payments having been made on these notes, except that in the interest column, opposite the \$100 note, the word "paid" is written, while in another column, opposite the same

note, the meaning and purpose of which is not clear, are the figures 5.45, probably meaning \$5.45. The sum of all these figures, including the \$5.45, is the same as the \$296.82 mentioned in the schedule of the affidavit verifying the executors' accounts as the amount of these three notes with interest.

Judgment.
MACLENNAN
J.A.

Now, what the executors say in their evidence about the notes is that there were endorsements on them when they came into their hands of payments made by the debtor in the life time of the testator; that Young was not a very solvent person, but that they got a payment of \$19 by a contra account, and \$70 by taking a horse from him, and that the balance then remaining was \$41.91, for which they took his note at three days date on the 26th June, 1875, which note they were not able to collect, for he soon afterwards absconded.

The Master's finding is as follows:—

"Item 1. I find that the promissory note made by Philip Young, Exhibit 4, dated June 26, 1875, for the sum of \$41.91 payable to the defendants, represents at the settlement between Young and defendants the balance then on the date of said note due by the said Young on account of the several promissory notes mentioned in said item 1 of said surcharge, and that said Young shortly after he made the said note left Canada in insolvent circumstances, and it was doubtful if the said promissory notes could have been collected between the death of the testator and the date of the said first mentioned promissory note, and that it could not have been collected since Young departed from Canada."

On appeal from this finding my learned brother Ferguson has reversed it, and has ordered the executors to be charged with the full amount of the notes. He has evidently given the matter most careful consideration, but with great respect I am unable to agree with his conclusion. I think whatever inference there is unfavourable to the executors which may be suggested from the form of the inventory, and its silence as to any endorsements of payment, or from the way in which the notes are referred to

Judgment. in the schedule ought not to outweigh the positive evidence of the executors of the settlement between themselves and Young when his note was taken for the balance which he owed, believed as that evidence was by the Master. I think, too, that the evidence of Mr. Steele, who prepared the affidavit and the schedule, fully explains how the latter came to be expressed as it is. He says he took the amount of the notes and interest from the old schedule, which is evident enough, and that he did not know at the time about the endorsements. Unless, therefore, the evidence of the executors required corroboration, I think there was ample evidence to warrant the Master's finding on this question in their favour. The learned Judge, however, with some hesitation, came to the conclusion that the case was within R. S. O. ch. 61, sec. 10, and that the evidence of the executors could not be acted upon without corroboration.

On this point I am, with great respect, of opinion that the statute does not apply. I think, even if it be conceded that the executors are opposite or interested parties to the action within the meaning of the section, that the question is not in respect of a matter occurring before the death of the deceased. The question was not whether payments had been made to the testator in his lifetime, but whether there were receipts for payment endorsed upon the notes. If there were such receipts the executors had a right to rely on them, just as if the debtor had produced such receipts in a separate form. They were not bound to suspect anything wrong or to enquire further as to payment, and the sole question, therefore, in my judgment was as to the existence of this endorsement. That being so, I think it was not within the statute, and that the evidence of the executors did not require corroboration.

I think, therefore, that this branch of the appeal also should be allowed.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal allowed with costs.

THE DOMINION BANK V. WIGGINS.

Bills of Exchange and Promissory Notes—Lien Note—Negotiable Instrument—Reservation of Title.

An instrument in the form of a promissory note, given for part of the price of an article, with the added condition "that the title and right to the possession of the property for which this note is given shall remain in (the vendors) until this note is paid" is not a promissory note or negotiable instrument, and the holder thereof takes it subject to any defence available to the maker against the vendors.

Judgment of the First Division Court of Peel reversed.

THIS was an appeal by the defendant from the judgment of His Honour Judge McCarthy, in the First Division Court of the county of Peel, and was argued before MACLENNAN, J. A., in Chambers, on the 2nd of June, 1894. Statement.

A. E. H. Creswicke, for the appellant.

W. S. Morphy, for the respondents.

June 7th, 1894. MACLENNAN, J. A.:—

The action is on three promissory notes dated the 13th of August, 1891, the first two for \$308 each, payable on the 1st of March, 1892 and 1893, respectively, and the third for \$309, payable on the 1st of March, 1894. The action was commenced on the 28th of November, 1893, before the third note had become due according to its tenor, and claimed a balance of \$200 on the three notes, all amounts due thereon in excess of \$200 being abandoned. The notes are all expressed in the same terms except the date of maturity, and the first one is as follows :

"\$308. "Brampton, Ont., 13th August, 1891.

"On the first day of March, 1892, value received, I promise to pay Haggert Bros. Man'f'g Co. (Limited) or order, three hundred and eight dollars, at the Dominion Bank, Brampton, with seven per cent. interest until due, and ten per cent. interest after due till paid.

"Should I sell or leave the land I now occupy, or make preparations to leave the Province, or should this note not

Judgment. be paid within one month after maturity, then in any such
MACLENNAN, case it and all other notes given by me to Haggert
J.A. Brothers Manufacturing Company, shall at once become due and payable, and suit may be entered and tried and finally disposed of in the Court having jurisdiction at the place of payment hereof. The title and right to the possession of the property for which this note is given shall remain in Haggert Bros. Man'f'g Co. until this note is paid."

At the trial it appeared that the notes had been given for a threshing machine and outfit, as it is called ; that the purchaser complained that it was defective and useless; that it was sent back to the vendors a few days after the first note became due, was received by them, and was afterwards sold by them to one Boynton for \$600 odd. The notes had been endorsed to the plaintiffs by the payees before maturity as security for their account, and they were not given up when the machinery was taken back, and there was no evidence that the property was taken back in the sense of cancelling the sale. When the property was re-sold, the proceeds, half cash and half on credit, were accounted for to the plaintiffs, and the cash was credited on the first note. At the trial credit was claimed by the defendants against the \$200 sued for, for the remainder of the purchase money on the re-sale, and it was also objected that the last note was not due, and could not be sued upon by the plaintiffs before maturity. The result of this objection was that the learned Judge allowed the third note to be withdrawn from the claim altogether, and this part of his decision is not now complained of. It was then objected that the instruments were not negotiable promissory notes, and that the plaintiffs could not sue upon them; and also that the plaintiffs took them with notice of some collateral agreement between the payees and the defendant, and that the payees having taken back the property the defence of want of consideration was open to the defendant.

The learned Judge gave judgment for the plaintiffs, and

the defendant's agents moved for a new trial. This motion was supported by affidavits setting up a number of defences as against the Haggert Company, but not in any way affecting the title of the present plaintiffs, assuming them to be holders for value in due course, and that the notes are negotiable. The learned Judge held the notes to be negotiable and the plaintiffs to be holders for value, but he offered the defendant a new trial on condition of paying the costs of the last trial, and giving security to the amount of \$100 to abide the result. The defendant refused to accept a new trial on those terms, and brought the present appeal.

Judgment.

MACLENNAN,
J.A.

The case was argued with great ability for the appellant by Mr. Creswicke, and for the respondents by Mr. W. S. Morphy.

It is unnecessary to consider many of the points which were discussed, because I am of opinion that the notes are not negotiable, and that for that reason the plaintiffs can maintain no action upon them.

If the special matter contained in the instruments had stopped with the words "payment hereof," I should have thought the negotiability of the notes not affected. The only effect of that special matter down to and including those words is that in certain events the time of payment might be accelerated. It does not make payment in any way conditional, nor is there any more uncertainty in the time of payment than in the case of a note payable on or before a certain day, or of a note payable on demand: See *Chesney v. St. John*, 4 A. R. 150; *Wise v. Charlton*, 4 A. & E. 786; *Jury v. Barker*, E. B. & E. 459; and see also *Sears v. Agricultural Insurance Co.*, 32 C. P. at p. 601.

It is otherwise, however, with the remainder of the special matter contained in the instrument. It provides that "the title and right to the possession of the property for which this note is given shall remain in Haggert Bros. Man'fg Co. until this note is paid." I think that stipulation is fatal to the instrument as a negotiable

Judgment. promissory note. It imports that the money which is to be paid is the consideration for the sale of property, and that neither the title nor the right to possession was to pass until payment. If that is so, it follows that the purchaser is not compellable to pay when the day of payment arrives unless at the same time he gets the property with a good title, and the payment to be made is therefore not an absolute unconditional payment at all events, such as is required to constitute a good promissory note. It is in effect a conditional payment. It is evident that even if when the note was signed possession was given, the payees could resume it at any time, for any reason, or for no reason; could do so next day, out of mere whim or caprice; and for anything contained in the writing, in the way of agreement by the vendors, they could sell the property to some one else, while the note was current, even against the will of the purchaser. But whether the purchaser could interfere to prevent that or not, they could sell and make a good title to a purchaser for value without notice. Having the title, and also the possession, such a sale with delivery would be unimpeachable as against the purchaser, and if such a sale were made, then clearly the maker of the note would not be liable to pay it at maturity. He could say I am ready to pay, but I want my property, and if it was not forthcoming, he could not be required to pay. But if the vendors still had the property, it is obvious that the payment of the money and the delivery of the property were to be contemporaneous acts, and neither of the parties was bound to perform his part, unless the other was ready to perform his. If that is the effect of the instrument as we find it, the payment is a conditional payment, and the instrument is not a negotiable promissory note, nor indeed a promissory note at all. This case is very much like *Third National Bank v. Armstrong*, 25 Minn. 530, referred to by the Chief Justice in *Sawyer v. Pringle*, 18 A. R. 218, to which my attention was directed by Mr. Creswicke.

MACLENNAN,
J.A.

I think that the appeal must be allowed with costs to the appellant both of this appeal and of the Court below, and that the action should be dismissed.

Judgment.

MACLENNAN,
J.A.

I may say that as the grounds of this decision may be of general interest and importance, I thought it my duty to confer with the other members of the Court before disposing of the appeal, and they agree in the conclusion which I have expressed.

Appeal allowed with costs.

DEROCHIE V. TOWN OF CORNWALL.

Municipal Corporations—Highway—Repair—Sidewalk—Ice—Negligence.

Allowing, for a fortnight, water to collect and alternately freeze and thaw in a depression in a sidewalk in a frequented street in a town, is non-repair for which the municipality is liable.

Judgment of the Chancery Division, 23 O. R. 355, affirmed, BURTON, J.A., dissenting.

THIS was an appeal by the defendants from the judgment of the Chancery Division, reported 23 O. R. 355.

Statement.

The plaintiff, on the 7th of March, 1891, while walking on a sidewalk in a frequented street in Cornwall, slipped and fell, breaking her wrist and sustaining other injuries, and brought this action to recover damages, alleging that the sidewalk had been for some time allowed to remain in an unsafe condition. The portion of the sidewalk in question had settled from age and decay, and at its outer edge a depression had formed in which water collected, freezing and thawing alternately.

The action was tried at Cornwall on the 9th of March, 1892, before MACMAHON, J., and a jury, when judgment was entered for the plaintiff for \$500. This judgment was set aside by the Chancery Division and the action was tried a second time at Cornwall on the 12th of October, 1892,

Statement. before ARMOUR, C. J., and a jury, when judgment was again entered for the plaintiff, this time for \$700, her injuries being shewn to be of a more permanent nature than was at first supposed.

The second judgment was upheld by the Chancery Division, [MEREDITH, J., dissenting] and the defendants appealed.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 12th of March, 1894.

Cassels, Q. C., and *Leitch*, Q. C., for the appellants.
Moss, Q. C. for the respondent.

The evidence was very fully discussed, and *Pictou v. Geldert*, [1893] A. C. 524, was cited in addition to the cases referred to below, the line of argument being the same as that reported below.

May 8th, 1894. HAGARTY, C. J. O.:—

A careful examination of the evidence, since the argument, has confirmed the opinion I then formed, that this is a case in which we cannot interfere.

It has been twice tried with the same result.

There is a large mass of evidence, and the case was very distinctly and elaborately explained to the jury by the learned trial Judge.

I am unable to see any reasonable objection to his charge.

The judgments of two of the learned Judges in the Chancery Division on the argument for a non-suit or new trial, also deal very fully with the case. I have fully considered also the judgment of the dissenting Judge.

I think the case is very fairly distinguishable from some of the actions against municipalities for injuries caused by falling or slipping on highways.

The law throws a very heavy responsibility on them when the injury results from non-repair, and it has been often said that practically the ratepayers are expected, and not unfrequently made, to be the insurers (as it were) of all passengers walking or driving on highways.

Judgment.
HAGARTY,
C.J.O.

I have always resisted the proposition that if a person slip or fall upon a frozen surface of a sidewalk, with merely proof that it was so frozen by the sudden fall of the temperature in our winter, such by itself created a cause of action. If, as is not uncommon, rain fall in the evening or night, and a sudden frost cause the sidewalk to present a glassy surface on the following morning or day, I cannot see how the municipality could be answerable for the slipping of a passenger.

But the case before us presents a different claim.

The place of the accident was at the most frequented spot in the town of Cornwall. There was a depression in the sidewalk there, partly from the level of the ground, partly from natural settling down of the sidewalk or its supports. Ice and snow had accumulated upon it for some time before and up to the accident; it was not a mere casual freezing, making the walk slippery; and for at least two weeks previous there had been much accumulation of water, ice and snow. It was shewn that water backed upon the sidewalk, and that persons had slipped and fallen there.

It was just in front of the steps of the hotel, leading down from its verandah to the sidewalk, that the plaintiff fell and was injured. Some witnesses spoke of passengers going upon the verandah and down the steps to get rid of the ice on the walk or to avoid it.

As the learned Judge remarked to the jury: "If the water remained there freezing and thawing, and remained in that state for a couple of weeks, it would be reasonable to say that the corporation must have known the condition of the sidewalk."

I think it was clearly a case in which the Judge could not have non-suited, but was bound to leave the question to the jury.

Judgment.

HAGARTY,
C.J.O.

The defendants called witnesses to support their contention that they had done their duty, and that the walk was in fair repair.

I refer to the judgment of the learned Chancellor, in which he states strongly and fully his view of the evidence in the case, and I need not repeat his vigorous language or his reference to some of the authorities.

If the jury here had found generally for the defendants I do not think we should have interfered. It was a fair question for a jury, and I am unable to say that their finding for the plaintiff was unreasonable—certainly not to the extent of warranting our interference.

Unless we are prepared to directly overrule *Caswell v. St. Mary's Road Co.*, 28 U. C. R. 247, where the late Sir A. Wilson delivered the judgment of the Queen's Bench, consisting of Richards, C. J., Wilson and Morrison, JJ., I think we must hold that a case was here made out sufficient to be submitted to a jury.

He says : " If snow collects at a spot, and by the thawing and freezing the travel upon it become specially dangerous, and if this special difficulty can be conveniently corrected by removing the snow or ice, or by other reasonable means, there must be the duty on the person or body on whom the care of reparation rests to make such place fit and safe for travel."

He points out that it must be a question for the jury. The case is noted in the report as appealed by the defendants, but we find no report of any appeal.

I think this case correctly lays down the law, and should not be overruled.

OSLER, and MACLENNAN, JJ.A., concurred.

BURTON, J. A. :—

If this judgment is to stand, the statutory liability of municipal bodies for omitting to keep highways within their jurisdiction in repair will be extended to an alarming extent.

It is scarcely necessary to say that in order to recover it was incumbent upon the plaintiff to shew a breach of some statutory duty on the part of the defendants, and that the breach of that duty was the proximate cause of the injury to the plaintiff.

Judgment.

BURTON,
J.A.

The sidewalk itself was in a good state of repair ; it is true that since its construction it had subsided, but not in a way to impair its usefulness as a way ; it was not uneven, but had sunk as a whole, and for the purpose of a highway was as good as on the first day after its construction.

I apprehend that since the decision of this Court, affirmed in the Supreme Court, of *Goldsmith v. City of London*, 16 S. C. R. 231, it can hardly be urged that a jury or a Court can dictate to the municipality how they shall construct their sidewalks ; had they raised this sidewalk six or seven inches and a person had been injured by falling from it in the dark, I think it would not have been contended that it did not constitute actionable negligence to leave such a sidewalk unfenced on each side.

But it was shewn that, under a by-law of the corporation, it was directed that every occupant or owner of every house fronting on a highway should, within the first four hours after every fall of snow, cause the same to be removed off the sidewalk, and to the extent of one foot out of the drains and gutters, and in pursuance of this by-law, the snow had been removed into the street, forming an embankment in the street itself some three or four feet, it is said, above the sidewalk, and this accumulation of snow melting from time to time, as described by the witnesses, for some days previously to the day of the accident, added to by a fall of snow and rain a few hours before the accident, and a sudden frost, caused the state of the sidewalk and its slippery condition when the plaintiff fell.

It may be that under the construction placed by our Courts (unfortunately, as I have always thought) upon the words, " keep in repair," the corporation might be liable to a person travelling along the highway by reason of

Judgment.
BURTON,
J.A.

his carriage being over-turned by coming in contact with the bank of snow so formed, although it has always appeared to me to be a strained and unreasonable construction of the words of our statute to hold that an obstruction left upon a highway was a want of repair; a construction adopted in the first instance, as I conceive, from an omission to observe the distinction between the words of our statute and those used in the Acts in the United States, where such a construction was adopted.

I think it not unlikely that the corporation might be civilly responsible to such a traveller on the ground that the act having been done in obedience to their by-law might be regarded as their own act as in *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214, where the liability was held to depend not upon the defendants' relation to the highway by reason of being charged with the duty of repairing it, but upon the ground that the obstruction was placed there by the defendants' servants.

I think I am safe in saying that no instance can be found of an indictment against a municipal corporation for an obstruction to a highway not placed upon it by themselves or their servants.

Perhaps in expressing myself thus strongly, I ought to offer some explanation of my own judgment in *Toms v. Whitby*, 37 U. C. R. 100.

Whatever general views are stated in that case, must, as in all other cases, be read in connection with and having reference to the facts.

There the corporation having the power, but being under no statutory obligation, to make regulations as to precipices and places dangerous to passengers, had, in making the approach to the bridge, deemed it proper to place a fence on the side of it, making it, in their judgment, a necessary part of the highway. The accident occurred, as it was found, by reason of this being out of repair, and if my words may seem to go beyond this, I wish to qualify them.

In the present case there was some conflict of evidence

as to water remaining upon the sidewalk for some days before the day of the accident, but a perusal of the evidence has satisfied me that a very exaggerated view has been taken of it ; and that its condition on the day of the accident was attributable partly, as the plaintiff herself states in her statement of claim, to the fact that the defendants had omitted to drain off the water ; and to the further fact that a large concourse of people met at the corner of the streets referred to on that day when it was thawing, and caused a large quantity of snow and slush to fall from the road upon the sidewalk. I extract from the statement of claim the plaintiff's own account of the cause of the accident :

Judgment.

BURTON,
J.A.

4b. The water so accumulating at the place where the plaintiff was injured as aforesaid, might easily have been carried off by draining the same into the public sewer which passes within a few feet of the place above mentioned, but the defendants have omitted and neglected to effect such drainage.

4c. The accumulation of ice and water at the place in question was greatly increased by the piling up of snow on the street immediately adjoining the said walk, and suffering the said snow to remain there until it was thawed by the action of the sun.

4d. It was in consequence solely of such omission and neglect to effect such drainage, and in consequence of the negligence of the defendants in permitting the snow to remain piled up as aforesaid, and in permitting the said sidewalk to become and remain in the dangerous condition aforesaid, that the plaintiff sustained the injuries aforesaid.

I think she fairly states the causes leading to the condition of the sidewalk by reason of the frost which succeeded the thaw about 8 o'clock on that day, and that no reasonable opportunity was afforded to the defendants to take steps to avoid the accident, if any such duty devolved upon them.

But assuming that there was an accumulation of water and slush upon the sidewalk to a much greater extent than

Judgment.
BURTON,
J.A.

the evidence warrants, how could that give a cause of action. It can scarcely be gravely contended that the defendants could have been indicted for the state of things during that period; and although they would know that if frost followed it would form ice, they could have no intuitive knowledge when the frost would set in. Suppose it had occurred in the middle of the night, and the accident had occurred before morning, would the defendants have been liable? If so, it could only be because they had omitted to make a catch-water drain or some other mode of removing the water; had been guilty of some non-feasance, in other words, for which no liability is cast upon them by the statute.

It is a mistake to suppose that there is any liability to a civil action (as was at one time held) because the defendants might be liable to indictment for breach of some duty cast on them by law; much less for the omission to do something, however beneficial it might be in the interests of the general public. It may be, although the evidence upon that point is conflicting, that the water at this particular point might have been carried off by a catch-water drain. The answer is, there is no such obligation cast on them by statute.

The municipal body is created by statute: its duties and responsibilities are regulated by it.

No obligation existed at common law which an individual suffering injury could enforce. I quite concede that if the defendants had undertaken to make a catch-water drain and had done the work negligently and thereby caused an injury, they would be liable; but in the case of mere non-feasance no claim for reparation will lie except at the instance of a person who can shew that the statute imposed upon the defendants a duty towards himself which they negligently failed to perform: see the remarks of Lord Watson in the House of Lords in *Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. at p. 411.

I regret that the opinion of the late Sir John Beverley Robinson in delivering the judgment of the full Court in

Stewart v. Woodstock, 15 U.C.R. at p. 429, was ever departed from when he laid it down that "letting snow lie on a macadamized road does not, in our opinion, come under the notion of suffering the road to go out of repair."

Judgment.
BURTON,
J.A.

In determining the question of the liability of the corporation, notwithstanding some *dicta* to the contrary, I agree with Mr. Justice Gwynne, who, construing the statute said "that such a state of repair as would exempt the city from liability on an indictment will also exempt them from liability in a civil action."

The liability to indictment and the right of a person injured to a civil action, are both given in the same clause of the statute, and I should have thought it could admit of no room for doubt that the default in both cases must be the same.

Much as I differ from those who have given the construction I refer to the word "repair" and have held the non-removal of ice to be non-repair, no case has yet gone so far as to make the municipality responsible to any greater extent than they would be for actual non-repair, that is to say, after notice and a reasonable time to make the repair. Assuming, for the sake of argument, that there was an obligation upon them to remove the ice after they knew it had formed, were they bound to have persons to watch the place during the night? If so, it is an extension of liability which few municipalities could afford to bear, and it is in effect making them responsible for not keeping all low places free from water, either by drain or otherwise—an obligation nowhere imposed upon them.

If there is no obligation under the statute to make drains to carry off the water, how can the existence of that water affect them with notice of the particular defect or want of repair, if that be a suitable expression, that was the proximate cause of the injury?

Assuming, and some of the members of the Court may feel themselves bound to hold, that the existence of snow or ice upon a sidewalk is non-repair, there is no reason, in my opinion, for extending that construction by holding

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that the existence of water upon the sidewalk, which the municipality was under no statutory obligation to remove, was equivalent to notice; there was, it is clear, no actual notice; the ice formed in the evening and the accident occurred very shortly afterwards; that was the proximate cause of the injury, and, in my opinion, shews no case of actionable negligence.

I have referred to the cases cited by the learned Chancellor, and upon which he seems to base his judgment. One of these was *Corbett v. City of Troy*, 53 Hun. 228, which, with great respect, I submit is no authority for holding these defendants liable. The defendants there had permitted a hydrant, which it was their duty to repair, to get out of repair, and were properly, in my opinion, held liable for the consequences.

In *Olson v. City of Worcester*, 122 Mass. 536, the wording of the statute is somewhat different from ours; but even if what was held there to be a "defect" in the way is good law in the State of Massachusetts, it is directly opposed, as I shall presently shew, to the decisions in England.

Adams v. Inhabitants of Chicopee, 147 Mass. 440, shews that what the Court was dealing with was the faulty construction of the way, as appears by the following extract:—

"A way may be defective by being so improperly constructed as to induce a special or constant deposit of ice in a particular locality." The question there was not a want of repair, but whether there was a defect in the way.

The case of *Gaylord v. City of New Britain*, 58 Conn. 398, goes far to uphold the view I am contending for, although there the liability created by the statute is much wider, in my opinion, than with us, but I make an extract as supporting my view.

"It is sufficient," one of the learned Judges says, "to say that we are aware of no case, in this or any other jurisdiction, wherein the liability of a corporation is extended in such regard beyond responsibility for existing defective con-

ditions within the limits of a walk of which it had, or ought to have had, knowledge, or in which it has been held that a duty (meaning, I assume, a statutory duty) devolved upon any such corporation to remove snow or ice, so long as it existed in the state and situation in which it originally fell or was formed outside the actual limits of the walk by reason of mere proximity and consequent liability to spread over and thereby render dangerous the walk itself. If such a duty can ever exist, we confess that we should be slow to find it." And another of the Judges, after remarking that the city assumes no legal responsibility by permitting snow to melt where it falls, nor any obligation to foresee and prevent the freezing of water from melted snow, says: "Of the ice in question the city had not such notice. It formed at nightfall and the plaintiff fell in the evening. It is of no legal significance that the city had knowledge that in repeated instances ice had formed at the same place. The ice which caused the fall of the plaintiff was a new and independent formation."

Judgment.

 BURTON,
J.A.

In *Gillrie v. City of Lockport*, 122 N. Y. 403, the sidewalk was itself out of repair, and in consequence of such want of repair, the ice had accumulated upon it causing the accident.

The remaining American case referred to by the Chancellor, *Cloughessey v. City of Waterbury*, 51 Conn. 405, is distinguishable, inasmuch as the statute there required the municipality to keep the highway safe and convenient for travellers at all times.

In fact in some of the States of the Union, corporations have been held liable at common law, in others by reason of the obligation to keep the streets *in such condition as to be safe and convenient for travel at all seasons of the year*. With us there is no common law liability, and the statute merely requires them to repair under such circumstances as would render them liable to indictment.

The case of *Shepperd v. Midland R. W. Co.*, 20 W. R. 705, proceeds upon different principles. The railway com-

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pany invited people to their station, and were bound at common law to keep it in a safe condition for passengers.

The present case was twice tried. On the first occasion the Court of Chancery set aside the verdict and directed a new trial. On the second occasion upon, as Mr. Justice Meredith says, the same state of facts, and substantially the same evidence, the majority of that Court refused to interfere. With great deference, I think the Court should have held that the plaintiff failed to make out her case by establishing negligence on the part of the defendants.

I think that the proximate cause of the accident was the ice which formed on the sidewalk after dark and shortly before the accident which the defendants had no opportunity of removing, even if there was any obligation upon them to do so, and that upon that short ground the plaintiff failed to make out a case of actionable negligence against the defendants, and I agree therefore with Mr. Justice Meredith in holding that judgment should have been given for the defendants.

Before closing I desire to add a few words in reference to a passage cited by the learned Chancellor from a judgment of Lord Bowen, for whose decisions I entertain the most profound respect.

It is cited for the purpose of shewing that repair would include the removal of snow or ice; but a reference to the judgment itself shews that it is not only no authority for such a proposition but to my mind directly the reverse.

The question there (*Leek Improvement Commissioners v. Justices of Stafford*, 20 Q. B. D. at p. 797) was whether the duty of maintenance or repair which was cast upon a particular body in reference to a macadamized road would extend to a paved road which had been substituted for the other. The language of the judgment is: "By the term 'repairs' is included, I think, whatever is necessary to keep *the* road in a proper condition for the traffic having regard to the character and original manufacture of the road, *but nothing further*," and the Lord Justice therefore held that this would not extend to the new

road, but it was repairs to the road itself, not something outside the road such as an obstruction.

Judgment.

BURTON,
J.A.

But even if that were open to doubt all such doubt is removed by the language of Mr. Justice Field, whose judgment in another case is also referred to in support of the same proposition. He says: (*McGiffin v. Palmer's Ship-building, etc., Co.*, 10 Q. B. D. at p. 9.) "In a grant of right of way, if such a case were brought forward, the declaration would not have been that the way was defective, but that it was obstructed. Actions are brought sometimes against railway companies for their stations being in a defective condition—out of repair; but if an action were brought against a railway company for leaving a bucket on a dark night in a dark passage, surely it would not be alleged that this constituted a defect in the way."

It is probably too late in this Court to contend for a different construction than that placed upon the word "repair," but I think sufficient has been shewn against an extension of that construction; and I hope if the case goes further the Court may not feel itself fettered by decision.

To show that no liability exists beyond that expressly given by the statute, I refer to the case of *Pictou v. Geldert*, [1893] A. C. 524, which reversed a number of decisions of the Supreme Court of Nova Scotia, where it had been held that the municipalities were liable, although the statutes transferring to them the obligation to keep the roads in repair gave no right of action to an individual who sustained an injury.

Similar statutes in New Brunswick were before the Supreme Court in *Town of Portland v. Griffiths*, 11 S. C. R. 333, and *City of St. John v. Christie*, 21 S. C. R. 1. There the objection does not appear to have been expressly taken, but Mr. Justice Gwynne, though stating his impression to be that, when the corporation were invested with exclusive powers to control and repair the highways, there would be a correlative obligation to exercise the powers and to make good any loss sustained by an individual,

Judgment. took the view which the Judicial Committee indicated was the correct view of their judgment in *Borough of Bathurst v. Macpherson*, 4 App. Cas. 256, that the conduct there complained of was an act of *misfeasance* not *nonfeasance*. See *Pictou v. Geldert*, [1893] A. C. 524.

BURTON, J.A.

Appeal dismissed with costs,
BURTON, J. A., *dissenting.*

See 57 Vic. ch. 50, sec. 13 (O.): REP.

DONOGH V. GILLESPIE.

Principal and Agent—Banks and Banking—Bills of Exchange and Promissory Notes—Payment—Set-off—Debtor and Creditor.

Bankers are subject to the principles of law governing ordinary agents, and, therefore, bankers to whom as agents a bill of exchange is forwarded for collection, can receive payment in money only, and cannot bind the principals by setting off the amount of the bill of exchange against a balance due by them to the acceptor.
Judgment of the County Court of York affirmed.

Statement. THIS was an appeal by the defendants from the judgment of the County Court of York.

The plaintiffs, who were lumber merchants carrying on business at Toronto, on the 29th of June, 1892, sold to the defendants, who carried on business at the village of Alvinston, certain lumber, the price of which was \$299.16, and on the 2nd of July, 1892, drew upon them for the price, the draft being as follows:—

\$299.18.

Toronto, July 2nd, 1892.

Three months after date, pay to the order of the Canadian Bank of Commerce, two hundred and ninety-nine $\frac{16}{100}$ dollars, at Alvinston. Value received.

To M. GILLESPIE & Co.,

DONOGH & OLIVER.

ALVINSTON.

This draft the plaintiffs, in the ordinary course of business, discounted with the Canadian Bank of Commerce, Toronto, who were their bankers, on the 8th of July, 1892, and were credited in their account with the proceeds, seventy-four cents being deducted for collection charges in addition to the discount. Statement.

On the 12th of July, 1892, the Canadian Bank of Commerce, having first endorsed the draft "for collection, on account of the Canadian Bank of Commerce, Toronto," forwarded it to Conn & Co., private bankers, at Alvinston, "for favour of collection and returns." The draft was presented to the defendants for acceptance, and was accepted by them, on the 16th of July, 1892, "payable at Conn & Co.'s banking office, at Alvinston."

The business of Conn & Co. was carried on by J. Conn, under that firm name, and that firm had been the defendants' bankers for several years, the account being credited in the ordinary way with discounts and deposits, and cheques and drafts being charged up against it without special instructions. On the 28th of September, 1892, the defendants discounted with Conn & Co., a note of one Givens, for \$246, having at the time at their credit \$181.36. The proceeds of the Givens' note were credited to the defendants in Conn & Co.'s ledger, on the 28th, but the entry was not carried into the pass-book, and the credit balance on the 30th of September was there struck at \$181.36. Without taking the Givens' note into consideration there was not enough at the defendants' credit on the 5th of October, to pay the plaintiffs' draft. After that date, however, deposits were made, and without taking the Givens' note into consideration, there was, on the 11th of October, more than enough at the defendants' credit to pay the plaintiffs' draft. On that day, without any special instructions from the defendants, Conn & Co. charged the draft to the defendants' account, marking it "paid," and sent to the Canadian Bank of Commerce, Toronto, their own cheque on the Merchants' Bank, St. Thomas, for the amount of the draft, less thirty-seven

Statement. cents collection charges. This cheque was received by the Canadian Bank of Commerce on the 14th, and was put through the clearing house on that day and was protested for non-payment in St. Thomas. The Canadian Bank of Commerce paid to the Merchants' Bank the amount of the cheque and protest fees, and notified the plaintiffs, who paid the amount to the Canadian Bank of Commerce.

Conn left Alvinston on the 11th of October, and on the 12th, made, at Sarnia, an assignment for the benefit of his creditors, and on the 13th, absconded. The banking business was carried on as usual on the 12th and 13th, and it was shewn that not until the doors of the bank were closed on the 14th, had the defendants any idea that he was in pecuniary difficulties. Conn's assignee gave the draft to the defendants with other vouchers.

On the 8th of March, 1893, the plaintiffs brought this action claiming both on the original consideration and on the draft, and the defendants pleaded payment and alleged that the plaintiffs were not holders of the draft.

The action was tried on the 14th of December, 1893, before His Honour Judge Morgan, who gave judgment in favour of the plaintiffs, and the defendants' appeal from this judgment was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 30th of May, 1894.

Aylesworth, Q. C., and *J. Cowan*, for the appellants. The Canadian Bank of Commerce were the absolute purchasers of this draft, and the plaintiffs' claim has been paid. They were, therefore, under no obligation to repay the amount of Conn & Co.'s cheque. The loss is the bank's: *Pollard v. Bank of England*, L. R. 6 Q. B. 623. But even if there was not an absolute purchase of the draft by the Canadian Bank of Commerce, they were the plaintiffs' agents for collection, and the mode of collection adopted by them is binding on the plaintiffs. Conn & Co. were the agents of

the Canadian Bank of Commerce and not of the defendants, and clearly the draft was paid as between the defendants and Conn & Co. Conn & Co.'s failure to pay the Canadian Bank of Commerce cannot affect the defendants' rights: *Daniel on Negotiable Instruments*, 3rd ed., secs. 325, 326, 334; *Pratt v. Foot*, 10 N. Y. 599; *Commercial Bank of Pennsylvania v. Union Bank of New York*, 11 N. Y. 203; *Boyd v. Nasmith*, 17 O. R. 40. Argument.

Shepley, Q. C., for the respondents. Conn & Co. in their capacity of agents for the plaintiffs or the Bank of Commerce, had no authority to receive payment from the defendants otherwise than in money. If the proceeds of the Givens' note are included, there is no doubt that Conn & Co. were debtors to the defendants to an amount exceeding the plaintiffs' draft; but none of the moneys owing by them had been paid in to them by the defendants specifically to meet the plaintiffs' draft. It is clear that an agent for collection cannot bind his principal by setting off his own debt to the person from whom it is his duty to collect: *Todd v. Reid*, 4 B. & Ald. 210; *Russell v. Bangley*, 4 B. & Ald. 395; *Underwood v. Nicholls*, 17 C. B. 239; *Catterall v. Hindle*, L. R. 1 C. P. 185; *Pearson v. Scott*, 9 Ch. D. 198; *Coupe v. Collyer*, 62 L. T. N. S. 927; *Crossley v. Magniac*, [1893] 1 Ch. 594; *Papè v. Westacott*, [1894] 1 Q. B. 272. And this rule applies to bankers who hold commercial paper for collection: *Ward v. Smith*, 7 Wall. 447; *Levi v. National Bank*, 5 Dill. 104; *Bolles on Banks*, sec. 473 *et seq.*

J. Cowan, in reply.

HAGARTY, C. J. O.:—

In my view this appeal fails on the short ground that what took place between Conn & Co., and the defendants, was not a payment of the draft as against the plaintiffs or the Canadian Bank of Commerce. Conn & Co.'s duty was to obtain payment in money and their adjustment of their own account with the defendants was not within the scope of their agency so as to bind their principals.

Statement. for \$800, which sum they had paid to him, and as being, therefore, interested in the action to that amount, and they sued therein for their own benefit.

In their statement of defence, the defendants, the Michigan Central Railway Company, set up that under the provisions of the Railway Act, 42 Vic. ch. 79 (D.), and of Provincial and Dominion Statutes relating to the Canada Southern Railway Company, they entered into an agreement with these co-defendants on the 12th of December, 1882, for the regulation and interchange of the traffic passing to and from their railways, and for the working of the traffic over their railways, and the management and working of the railways, and that they had since the date of the agreement worked and operated the railway of their co-defendants, the Canada Southern Railway Company, in accordance with such agreement; and that they were under said agreement entitled to operate it for and on behalf of their co-defendants, and were subject and entitled to all rights, privileges, duties, and obligations which the latter were subject and entitled to, and were empowered to run their locomotives on said railway.

The important clauses of the agreement of the 12th of December, 1882, were the following :—

There was a recital that the said companies, parties thereto, for the purpose of mutually benefiting the traffic over their lines, and for the economy of the working thereof, had resolved to make the arrangement thereafter contained for the regulation and interchange of traffic and the working of traffic over the railways of the said companies, and for the division and apportionment of tolls, rates and charges, and for the management of the railways of the said companies, and the running and operation thereof, and all railways in connection therewith, over which the said companies, or either of them, had control, as aforesaid.

Then followed covenants on the part of the Canada Southern Railway Company :—

1st. That it will, concurrently with the taking effect of

this agreement, for the purpose of the working and management of the said roads, as hereinafter provided, transfer and deliver the possession and control of its main line of road hereinbefore described, together with the several lines of branch roads appurtenant thereto, and also all the plant, equipment and property of every kind and nature appurtenant to the said road, main line and branches, or acquired or held for use in connection therewith, etc., * * to the said Michigan Company, and will, and does hereby, give to the said Michigan Company the right at the date above named, to enter upon and take possession of the said road, main line and branches, and the said other property, and thereafter, during the continuance of this agreement, to retain possession thereof, and to maintain, work, and operate the said road, in the manner in which it, the said Michigan Company, hereinafter covenants that it will maintain, work and operate the same ; provided, however, that nothing herein contained shall have effect to transfer the ownership of any of the several lines of railway, or branches or appurtenances, or any of the property, real or personal, owned or controlled by the said Canada Company.

* * * * *

3rd. That it will, during the continuance of this agreement, keep up its corporate organization, and will from time to time, and in due time, perform all acts which it is or may be by law in that behalf required to perform, and will neither do, nor suffer to be done, any act by which its corporate existence, rights and franchises, or either of them, may become subject to forfeiture or impairment. * *

* * * * *

7th. That it will, to the extent of its corporate powers, make any and all further and other assurances, conveyances and contracts which may be advised by counsel as necessary to protect the said Michigan Company in the possession of the said railroads and other property hereby transferred, or intended so to be, and will, during the con-

Statement.

The action was tried at Welland on the 22nd of March, 1892, before STREET, J., and a jury. No evidence of negligence in the management or construction of the locomotive was given, and the learned Judge, following an unreported decision of the Common Pleas Division of *Tilton v. Canada Southern R. W. Co. et al.*, held that the Michigan Central Railway Company were authorized to operate the railway and dismissed the action. This judgment was affirmed by the Queen's Bench Division for the same reason, and the plaintiffs appealed, the appeal being argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 20th and 21st of March, 1894.

Moss, Q. C., for the appellants. The damage was caused by fire from a locomotive of the Michigan Central Railway Company, and it was not necessary for the plaintiffs to shew any negligence in the construction or running of the locomotive, for the principle established in *Rylands v. Fletcher*, L. R. 3 H. L. 330, applies, inasmuch as that company was not authorized by statute or otherwise to use fire in this country as a motor for their locomotives: *Vaughan v. Taff Vale R. W. Co.*, 3 H. & N. 743, 5 H. & N. 679; *Jones v. Festiniog R. W. Co.*, L. R. 3 Q. B. 733; *Powell v. Fall*, 5 Q. B. D. 597; *Hilliard v. Thurston*, 9 A. R. 514. The effect of the agreement in question is practically that of a lease for twenty-one years, with covenants by the lessees to operate the road leased, indemnifying the lessors against liability for damages or losses which may be incurred in doing so, and it is one which it was not competent to the companies to enter into; and is, therefore, *ultra vires*, and confers no rights or privileges upon the Michigan Central Railway Company, so far as the public is concerned. The railway legislation in force at the time the agreement in question was entered into, was the Consolidated Railway Act of 1879, 42 Vic. ch. 9 (D.), and the amending Act of 1881, 44 Vic. ch. 24 (D.). It is contended by the respondents that section 60 of the Consolidated Act of 1879, empowered the two companies to

or new branches constructed, during the continuance of this agreement. Statement.

Then followed certain clauses mutually agreed upon :—

1st. The Michigan Company shall manage and operate all roads and branches covered by this agreement without discrimination or preference in favour of or against the roads and branches of either company, parties hereto, and shall, as far as practicable, and as is to the interest of both parties hereto, send over the roads and branches of the Canada Company all railway traffic, the route or direction of which it can control, and which is destined for points which can be reached by the roads of the Canada Company or its connections, and shall maintain and foster the existing south-western connection of the roads of the Canada Company, and all other business, whether through or local, of the Canada Company.

By the 15th clause of this part, it was provided that the agreement should take effect on the 1st of January, 1883, and should continue for the term of twenty-one years, and that if default should be made by either party in performance of the covenants and agreements on its part, the other might, at its option, if the default continued for more than three months, declare the agreement rescinded.

Clause three of this part, provided that all the gross earnings, revenues, and receipts derived from the maintenance and operation of the roads covered by the agreement, *i. e.*, the roads of both companies as set forth in one of the recitals of the agreement, should be appropriated (1) towards payment of the cost of maintaining in good condition, and of working and operating the roads, including maintenance and renewal of plant and payment of taxes and assessments, and maintenance of organization of both companies ; (2) payment of certain fixed charges; and (3) that the residue, if any, should be divided between the two companies in the proportion of 33½ per cent. to the Canada Company, and of 66½ per cent. to the Michigan Company.

Argument. proof the action was properly dismissed as against both the defendants. In any event under the agreement the respondents would not be liable for damages without proof of defective or improper construction of the engine in question, or of negligence in the management thereof, and no evidence of negligence was given, as the appellants admit. The agreement is not, as is contended by the appellants, in effect a lease, but is, as its terms shew, an arrangement and agreement for the regulation and interchange of traffic between, and for the working of traffic over, the railways of the respective companies, and for the management of both railways, and the running and operation thereof. It was made pursuant to the provisions of the Railway Acts in force at its date, and is within the scope and meaning of the statutes under which it was made and executed, and it is therefore valid : 42 Vic. ch. 9, sec. 60 (D.). The respondents further contend that the Canada Southern Railway Company had power to enter into the agreement in question under the special Acts relating to that railway, and refer particularly to the following statutes as conferring that power : 35 Vic. ch. 48 (O.) ; 36 Vic. ch. 86 (O.) ; 37 Vic. ch. 68 (D.). The status of the Michigan Central Railway Company in Canada has been recognized by various Acts of both the Parliament of Canada and the Legislature of Ontario : See 56 Vic. ch. 44 (D.) ; 56 Vic. ch. 51 (D.). The tendency of the more recent decisions is to amplify the powers that may be delegated : *Midland R. W. Co. v. Great Western R. W. Co.*, L. R. 8 Ch. 841 ; *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D. 449.

Moss, Q. C., in reply.

May 8th, 1894. BURTON, J. A. :—

The short point for decision in this case is whether the defendants, who were using a locomotive engine worked by steam, with no express parliamentary powers making lawful that use, are liable to a person whose pro-

perty was destroyed by fire thrown from the engine although no negligence was established.

Judgment.

BURTON,
J.A.

The defendants concede that no Canadian legislation has conferred upon them by name any statutory authority to work a line of railway in this country by the force and power of steam; but they contend that by virtue of an agreement dated the 12th day of December, 1882, they are entitled to the benefits which were conferred upon the Canada Southern Railway Company under their Acts or the General Railway Act of 1879 and the amendment of 1881.

It was urged before us that the agreement in question was such a complete abandonment by the Canada Southern Railway, and such a delegation to the other defendants, a foreign corporation, of all the powers which have been conferred upon it by Act of Parliament, as to amount to an attempt to effect that which Parliament alone can authorize, and was against public policy. I wish especially to guard myself against expressing any opinion upon that question beyond what may be necessary to the decision of this case.

I quite concede that section 60 to which we were referred as the statutory authority for the agreement in this case, is a very full authority to make what are well understood among railway men as traffic arrangements; but it is to be noted that within six months from the making of this agreement, the Act was amended so as to make the approval of the Governor-General in Council essential to the validity of such arrangements. The other statutes to which we were referred carry the case no further: 35 Vic. ch. 48 (O.); 36 Vic. ch. 86 (O.).

As I have said, the terms of section 60 are very wide, giving very extensive powers as to the making of such arrangements, and generally for affording facilities for the receiving, forwarding and delivery of traffic over their respective lines (I am assuming for this purpose that no such lease as is created under this agreement had been made), but if a traffic arrangement, pure and simple, in

Judgment.

BURTON,
J.A.

the widest terms authorized by section 60 had been made, it appears to me to be too clear to admit of argument that the Michigan Central could not under its provisions compel the Canada Southern to receive freight or traffic of any kind to be carried and moved by engines of the former company. The Canada Southern would be bound to receive, carry and deliver any traffic, including in that term passengers and their baggage—goods, animals and things—conveyed by railway, and also the cars, trucks and vehicles in which they are being carried.

There is nothing, of course, to prevent the Canada Southern voluntarily permitting the Michigan Central to use their locomotives in conveying the traffic over their line, but they would in so doing incur the liability which every one incurs who uses a dangerous thing; he must do so at his peril, and is liable for the consequences if it escapes and does injury to his neighbour.

What I do not find in any of the Acts to which we have been referred, is authority—and without express authority it cannot be upheld—for the Canada Southern to grant power to the other company to operate the road “with like charter or statutory rights and privileges as they themselves had.”

Running powers and traffic arrangements are essentially different in their character. It may be that the Legislature might, if applied to, grant power to these defendants to run their locomotives in Canada with like privileges against actions as they have granted to our own railways, but in passing such legislation it might become a pertinent enquiry whether similar privileges are granted to our railways in the United States. Our duties are confined to ascertaining whether the statutes to which we have been referred afford any justification to these defendants, and with great respect to those who differ from me I can find no such protection.

I have not thought it necessary to analyze the cases referred to by the learned counsel for the defendants, as shewing a disposition on the part of the Court to enlarge

the powers of corporate bodies at the present day. It may be conceded that a railway corporation has by inference power to enter into any species of contracts which are incident to the purposes for which it was created and the business in which it is engaged, except in so far as this power is expressly or impliedly restricted by the terms of its charter or the general law, but it can scarcely be pretended that a transfer of its chartered powers to another comes within its general powers or is not impliedly prohibited. I am of opinion, therefore, that so far as this agreement professed to extend to the Michigan Company the immunities the Canada Southern Railway enjoyed in running its own locomotives, it exceeded its powers, and the defendants are without protection.

Judgment.
BURTON,
J.A.

I should, therefore, have held the plaintiff Wealleans entitled to recover, but it was said the question of whether the sparks proceeded from the defendants' engine was not submitted to the jury. It seems incredible that the case should have been allowed to come to this Court without this question having been disposed of, but if it be so, we can only order a new trial.

OSLER, J.A.:—

[The learned Judge stated the facts as already set out, and continued:]

So far as the appeal of the plaintiffs, The London Mutual Fire Insurance Company, is concerned, I am of opinion that it must be dismissed. I consider that on the facts alleged they have no *locus standi* in the action, which, as to them, must be regarded as at an end. So also as to the defendants, the Canada Southern Railway Company, who are in fact not strictly parties to the appeal, and against whom relief is no longer sought. The sole question is as to the Michigan Central Railway Company, whether that company was lawfully operating their co-defendants' line of railway. If they were so lawfully operating the line, or lawfully running over it the locomotive engine which

Judgment.
OSLER,
J.A.

caused the damage to the plaintiff, the appeal must fail, it being conceded that there was no evidence of negligence.

Then as to the Michigan Central Railway Company: It is evident from the recital of the agreement that it was intended to be made in exercise of the statutory powers conferred upon the Canada Southern Company by the Consolidated Railway Act of 1879, 42 Vic. ch. 9, sec. 60 (D.), an Act to which the company was subject, though originally incorporated by Ontario legislation, having been declared a work for the general advantage of Canada by 37 Vic. ch. 68 (D.). By the same Act it was also expressly re-incorporated as a Dominion Railway, with all the franchises, rights, powers, etc., conferred upon it by the Ontario Acts. These Acts, particularly 35 Vic. ch. 48, sec. 9 (O.), though relied upon in the argument, do not seem to me to be of much assistance to the defendants on the question now raised. I think they must stand or fall upon section 60, which enacts that the directors of any railway company may at any time make agreements or arrangements with any other company either in Canada or elsewhere (a) for the regulation and interchange of traffic, passing to and from their railway; (b) and for the working of the traffic over the said railways respectively; (c) or for either of those objects separately; (d) and for the division and apportionment of the tolls, rates and charges in respect of such traffic; (e) and generally in relation to the management and working of the railways or any of them or any part thereof, and of any railway or railways in connection therewith, for any term not exceeding 21 years, and to provide by proxy or otherwise for the appointment of a joint committee for the better carrying into effect such agreement or arrangement, with such powers and franchises as may be considered necessary or expedient, subject to the consent of two-thirds of the stockholders, voting in person or by proxy. Some years later the assent of the Governor-General in Council was also made essential to the validity of such

an arrangement by the Railway Act of Canada, R. S. C. ch. 109, sec. 56. Judgment.

OSLER,
J.A.

In the reasons against the appeal it is said, that the status of the Michigan Central Railway in Canada has been recognized by various Dominion and Provincial Acts. We were not referred to these Acts in the argument, and I have not succeeded in finding them. If there are any such which refer to the agreement in question, they might have an important bearing on its validity.

In the law of railway and other corporations, no principle is better settled than that, except so far as they are by express, or necessarily implied, statutory authority enabled to do so, they cannot divest themselves of their franchises or delegate to others the performance or exercise of the duties or powers which the Legislature has imposed or conferred upon them. In other words, "they may not give up to others the control of their special powers or of their undertakings, whether on pretence of business conventions or otherwise" : Brice's Doctrine of Ultra Vires, 3rd ed., pp. 482, 484, and authorities there cited; *Branch v. Jesup*, 106 U. S. 468.

"A company cannot make a lease," *i. e.*, a lease of their railway "without the authority of Parliament. That has been expressly decided, and I quite agree that where an agreement under the shape and colour of a working agreement really amounts to a lease, so as to be a delegation of the whole concern and all its powers, that is as operative as a lease itself:" *per* Lord Blackburn in *Attorney-General v. Great Eastern R. W. Co.*, 5 App. Cas. at p. 484. The word "operative" is probably, from the context of the whole judgment, either a misprint for "inoperative" or may mean no more than that such an agreement as is referred to is neither more nor less, neither better nor worse, than a lease. I refer also to *Attorney-General v. Niagara Falls International Bridge Co.*, 20 Gr. 34.

The agreements and arrangements which by section 61 one company is authorized to enter into with another, either in Canada or elsewhere, are traffic arrangements for

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OSLER,
J.A.

the regulation and interchange of traffic passing over their lines, and in some of the cases which have arisen under corresponding provisions it has been difficult to determine under which head, that of legal traffic arrangements or illegal transfer of powers, a particular agreement is to be placed. Many of these cases are referred to in Brice, at pp. 495 *et seq.* The agreement we are now dealing with appears to me to go far beyond any of those of which it was possible to urge that the construction was doubtful.

It is not merely a contract by which, assuming this to be legal, another railway company is employed to operate the road in behalf of and under the direction and control of the corporation owning the franchise, the latter receiving a share of the profit as compensation, but the entire control of the road with all its franchises is transferred ; and it is for this that the compensation is to be paid.

It is something more than a mere agreement for the division of profits, or than a forwarding agreement, or an agreement for conferring running powers, or for the convenient or economical working of the joint traffic. Agreements of this description might well be held to come within the wide words of section 60.

Had the company been authorized to lease or transfer its line into the uncontrolled possession and management of another company, it would be difficult to frame an agreement in language more apt for that purpose than is employed in the one before us. I think it was here rightly argued that the agreement does in substance and effect amount to a lease of the Canada Company's roads to the Michigan Company for the term of twenty-one years, and the case of *Thomas v. Railroad Co.*, 101 U. S. 71, is an authority for so construing it. "We know," say the Court, "of no element of a lease which is wanting in this instrument," and after citing authorities proceed: "The railroad and all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls, are for a period of twenty years leased by the company to the plaintiffs, from whom in return it receives

as rent one half of all the gross earnings of the road. The usual provision for a right of re-entry on the failure to perform covenants * * and the usual covenant for repairs and proper running of the road * * are inserted in the instrument. The provision for the complete possession, control, and use of the property of the company and its franchises by the lessees is perfect. Nothing is left in the lessor but the right to receive rent. No power of control in the management of the road and in the exercises of the franchises of the company is reserved." It is true that in the agreement there in question the terms "lease," "lessees," etc., are used, but the judgment of the Court does not turn on that, and it was contended that the contract could not fairly be called a lease. All we have to see, however, is whether the agreement, in the language of Lord Blackburn above quoted, "really amounts to a lease so as to be a delegation of the whole concern and all its powers." I am clearly of opinion that it does. I would willingly, if possible, have supported the agreement as being one "generally in relation to the management and working of the railways, or any of them, or any part thereof." But these words in section 60 cannot have, I think, the large effect of enabling one company to delegate its franchises and the control and management of its road in the manner which this agreement does, and the last clause of the section regarding the appointment of a joint committee for the better carrying out of the original arrangement which the section authorizes indicates the limits within which the company may abandon the internal control of its line.

Judgment.

OSLER,
J.A.

It was not argued, nor do I suppose it could be contended, that the agreement amounted merely to a giving of reasonable facilities for the use by the Michigan Central Railway Company of the Canada Southern Railway Company's railway as being a continuous line of communication, under section 60, sub-section 2, a clause which was repealed, and a new sub-section substituted, by the Act of 1883, 46 Vic. ch. 24 (D.), an Act which contains several new

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OSLER,
J.A.

and suggestive provisions as to the acquirement of a railway by a person or corporation not having corporate powers authorizing the holding or operating of it.

Being of opinion, therefore, that the agreement is one *ultra vires* the Canada Southern Railway Company in the sense that the making of it was not within the powers granted to them, the next question is in what position the Michigan Central Railway Company stands to those who, like the plaintiff, suffer damage from a fire arising in the ordinary course of operating the road. That the agreement might be called in question in a shareholders' suit or by the Attorney-General on behalf of the public I apprehend there can be no doubt; but the question is whether this plaintiff can do so for the purpose of relieving himself from the obligation of proving that his loss was caused by negligence, as he would have had to do had the road been operated by the Canada Southern Railway Company.

I have not found any case bearing much resemblance to this in its circumstances, but in principle it appears to me that the plaintiff, as a person who has been actually damaged in the operation of the road under the agreement, must be entitled to shew that it is *ultra vires* the Canada Southern Railway Company, and so to shew that the Michigan Central Railway Company were not operating the road under any statutory authority. It must be clearly borne in mind that the acts of operating the road, running the locomotive, etc., were the acts of the Michigan Central Railway Company and not those of the Canada Southern, though done, so far as they are stated to be done, in the name of the latter, but not, as the statement of defence asserts, for and on behalf of that company. In that state of things the plaintiff is entitled to rest his case upon proof that the fire was caused by a locomotive run under the direction and authority of the Michigan Central Railway Company, and that as in doing so they were not acting under any statutory authority or of any agreement or condition of things authorized or recognized by statute, it was

not necessary to prove in addition that such locomotive was negligently constructed or managed. The case comes within the principle of such authorities as *Jones v. Festiniog R. W. Co.*, L. R. 3 Q. B. 733; *Hilliard v. Thurston*, 9 A. R. 514.

Judgment.

 OSLER,
J.A.

The appeal must therefore be allowed, and a new trial directed, though I must say that I cannot understand why at the former trial all the facts were not gone into necessary to determine the case subject to the question of law involved. I am glad that we are able to give judgment at this time while Parliament is sitting, as the defendants may be able to apply, if so advised, for legislative sanction of an agreement which has probably been found to be in the interests of the parties and the public.

MACLENNAN, J.A. :—

The question in this appeal is whether the defendants, the Michigan Central Railway Company, have statutory authority to use locomotives propelled by steam in conducting their traffic over the line of the other company, the Canada Southern Railway Company. It is admitted that they have no express authority either from Parliament or from the Legislature of the Province. It is not sufficient that they should have legal permission from the other company, which is the owner of the soil and freehold of the roadbed, to use such locomotives. A private owner may lawfully have and use a locomotive or other steam engine on his own ground or on navigable waters, without any legislative authority; but in that case he is subject to the common law duty declared in *Rylands v. Fletcher*, L. R. 3 H. L. 330, and applied in *Jones v. Festiniog R. W. Co.*, L. R. 3 Q. B. 733, of preventing the escape of sparks of fire to the injury of the neighbouring land-owner. In the case of *Jones v. Festiniog R. W. Co.*, Lord Blackburn said: "Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the

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MACLENNAN,
J.A.

engines from doing injury, and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shewn on their part." In *Hammersmith and City R. W. Co. v. Brand*, L. R. 4 H. L. 171, Lord Chelmsford said (p. 201) that it was established by *Rex v. Pease*, 4 B. & Ad. 30, and *Vaughan v. Taff Vale R. W. Co.*, 5 H. & N. 679, "that when the legislature has sanctioned the use of a locomotive engine there is no liability for any injury caused by using it so long as every precaution is taken consistent with its use." The language used by Lord Blackburn is "express parliamentary power," but probably, as said by Beven in his work on Negligence, in summarizing the result of the decisions, it is sufficient to exempt from the common law liability to have "clear statutory authorization." In the present case it is contended that the Michigan Central Railway Company, which is a foreign corporation, deriving its corporate power and franchises from a foreign jurisdiction, has acquired and possesses that clear statutory authorization, not directly from or by Canadian legislation, but indirectly through an agreement with the Canada Southern Railway Company, which has been authorized and sanctioned by such legislation. The agreement relied on is one dated the 12th of December, 1882, under which the Canada Southern Railway Company delivered to the Michigan Central Railway Company the possession and control of its road, and the plant and equipment properly belonging thereto, and the right to work and operate it for twenty-one years. The Michigan Central Railway Company covenanted to take possession and to maintain, manage, work and operate the road in like manner and in all respects as it would do if it were the owner thereof (but in the name of the Canada Southern Railway Company), "with like charter or statutory rights, privileges, duties and obligations as the said Canada Company now has, and will observe and perform such duties and obligations in the same manner as said company would be bound to do if this agreement were not made."

I do not find anything else in the agreement which can be contended with any plausibility to confer, if the company could by any agreement whatever do so, upon the Michigan Company the statutory power which the Canada Company itself undoubtedly possessed of using locomotives on their line. Now it may, and I think ought to be conceded, that this agreement contemplates that the Michigan Company shall operate the road in the usual way with locomotives, for in part 5 of the first part of the agreement, section 6, express provision is made for as many as 125 of those engines; and I think it follows that so far as they could do so the Canada Company has given to the Michigan Company the power to use locomotives on the line. It is one thing, however, to authorize the Michigan Company to operate their line with locomotives, and another thing to give them statutory power to do so, the statutory power which the Canada Company itself possessed, and I do not find any words in this agreement professing or attempting to transfer the statutory power. It is true the Michigan Company covenant to operate the road with like charter or statutory rights, privileges, duties and obligations, etc., but such a covenant could not possibly, in my opinion, operate as a grant or transfer of charter or statutory rights from the covenantee to the covenantor.

Judgment

MAGLENNAN,
J.A.

It was contended that the agreement was authorized by section 9 of the Act 36 Vic. ch. 86 of the Province, afterwards confirmed by the Dominion Act 37 Vic. ch. 68, and also by section 60 of the Railway Act then in force, 42 Vic. ch. 9. The Ontario Act authorizes the company to agree with any other railway company with respect to, among other things, "the use and working of the railway, and the conveyance of traffic thereon," and the Railway Act (section 60) authorizes such agreements "generally in relation to the management and working of the railways or any part thereof." These are very large powers of contract, but there is nothing in either of them which authorizes the company to confer on any other company any of its own

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MACLENNAN,
J.A.

corporate powers. They can give them possession of their line and their rolling stock and equipment, and can authorize them to operate the whole ; but in doing so, the other company can only use its own corporate powers, whatever they may be. In the same way the company might authorize a private person to run a locomotive of his own over the line, or might lend or hire one or more of their own locomotives to him, but I think it is clear they could not confer on him the statutory immunity from liability in the absence of negligence which they themselves possessed. That statutory immunity is a part of their corporate franchise, and is incapable of being demised or transferred or assigned without express power for the purpose. The distinction is between the common law right to use a dangerous machine, or substance, or thing on one's own land, and a statutory right to use the same thing. The Festiniog Company was a railway company, and they had an undoubted right to use locomotives on their own line, but subject to liability for any damage they might do to neighbouring properties, whether arising from negligence or not. What the company lacked was the statutory authority, which would have given them immunity. I think that is the position of the Michigan Central Railway Company in this case. They are fully authorized to use locomotives, but not possessing statutory authority to do so their liability for damage is according to the rule of the common law. I think the Canada Southern Railway Company could not even if they tried confer or assign such authority upon or to the Michigan Central Railway Company, and that if they had the power the agreement does not profess to confer it.

I think the appeal should be allowed.

HAGARTY, C. J. O. :—

The main, if not the only point for discussion, may be stated thus. The plaintiffs' barn and its contents were burned, as he claims, by fire from an engine on the de-

fendants' line. No proof of negligence of any kind was offered. It was insisted that as the engine was run by the Michigan Central Railway over the line of the Canada Southern Railway, the former corporation had no legal authority to run carriages propelled by steam or to use fire, and were therefore liable for the escape of fire with or without negligence. It was conceded that the case failed as to the Canada Southern Railway.

Judgment.
HAGARTY,
C.J.O.

The agreement, the terms of which have already been fully stated, is objected to by the plaintiffs as wholly unlawful, and a complete handing over to a foreign corporation of the entire control, etc., of the Canadian road.

The Canada Southern Company was chartered by the Ontario Legislature.

By 35 Vic. ch. 48 sec. 9 (O.), the company were empowered to make arrangements for the conveyance or transit of traffic with any other railway company, or with the International or any other railway, bridge or tunnel company, with respect to all matters as to maintenance and management of the works of the company respectively or any part, and the use and working of the railway or bridge, and the conveyance of traffic thereon, etc., etc.

In 1874, by the Dominion Act 37 Vic. ch. 68, this road was declared to be for the general benefit of Canada, and to come under the jurisdiction of Canada, with all the powers and franchises held under the Ontario charter. The Act recited that from the location of its lines, with respect to connecting lines in the United States, it was necessary for the better transaction of its business, and that the company had represented that it was necessary, that it should become a corporation under the Dominion jurisdiction.

The agreement in question was made under the authority of the Dominion Railway Act of 1879, 42 Vic. ch. 9, sec. 60. The main clause is as follows:—

“The directors of any railway company may, at any time, make agreements or arrangements with any other company, either in Canada or elsewhere, for the regulation and interchange of traffic passing to and from their

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HAGARTY,
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railways, and for the working of the traffic over the said railways respectively, or for either of those objects separately, and for the division and apportionment of tolls, rates, and charges in respect of such traffic, and generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway or railways in connection therewith, for any term not exceeding twenty-one years, and to provide either by proxy or otherwise, for the appointment of a joint committee or committees for the better carrying into effect any such agreement or arrangement, with such powers and functions as may be considered necessary or expedient, subject to the consent of two-thirds of the stockholders voting in person or by proxy."

Provisions are then made for the return of carriages and other vehicles, and for affording all reasonable facilities for receiving and forwarding all traffic in the case of railways forming part of a continuous line of railway in the using of it as a continuous line of communication. And by sub-section 5, the word "traffic" includes passengers, baggage, goods, animals, and things conveyed by railway, and cars, trucks, and vehicles of any description adapted for running over any railway.

The course of legislation for many years in railway matters has been to permit and facilitate in every way all arrangements between our railways and the American railway systems as to the respective user of the lines and transport of passengers and traffic, especially when the Canadian and the foreign line between them constitute a continuous line of communication. Many Acts and provisions of Acts may be referred to indicative of such purpose. I might mention an Act of last session, 56 Vic. ch. 44 (D.) and ch. 51 of same session.

Parliament has also expressly sanctioned arrangements by this Canada Southern Railway Company with foreign corporations of the most extensive kind, down to the mortgage to Mr. Vanderbilt and others of every description of property, real and personal, etc. I refer to the Act of

1878, 41 Vic. ch. 27 (D.), generally called the Arrangement Act of the Canada Southern Railway Company.

Judgment.
HAGARTY,
C.J.O.

These two railroads between them form a very important continuous line between the State of Michigan and the west through Canada to a junction with the New York lines over the Niagara River.

The Canada Southern Railway Company by the agreement preserves all its corporate existence and franchises, and all its rolling stock is to be used by the Michigan Central Railway Company. The residue of the gross earnings, after payment of all charges and expenses, is to be apportioned at a named rate between the two companies.

The injury claimed here was done by sparks from a locomotive owned by the Canada Southern Railway Company but under the actual management of the Michigan Central Railway Company. It is insisted for the plaintiff that the permission to use steam propelled locomotives on this railway is not accorded to the foreign corporation; that they are running the trains at their own peril and are liable for the escape of fire with or without negligence.

If Parliament has not sanctioned the use of this railway so that a foreign corporation can by consent and agreement of the Canada Southern Railway Company lawfully run over it, then the plaintiff's argument must prevail.

I think under the statutable powers the Canada Southern Railway Company might authorize the Michigan Central Railway Company to run trains over their line for carriage of passengers or freight. If so, I think such trains would be lawfully there using locomotives, and I cannot understand why we should apply the principle laid down in *Jones v. Festiniog R. W Co.*, L. R. 3 Q. B. 733, to the use of railways in the present day.

Once grant that the Legislature allows the Canadian company in a continuous line of communication to arrange with a foreign company to pass its trains over their line, I think that the ordinary consequence must follow. It

Judgment.
HAGARTY,
C.J.O.

is the lawful passage through Canada of a locomotive propelled by fire heat—by a lawful use of a dangerous element—and in the absence of negligence no action lies for damages caused by escape of fire. I at once agree that if the statutable authority does not permit the Canadian company thus to give a running power or license to the foreign company my conclusion is erroneous.

I think that under this authority the company could contract with a foreign company or individual to supply rolling stock, and to run such rolling stock, supplying engineers, firemen, etc., therefor; or could contract for the daily working and running of the Canada Southern Company's own rolling stock at a fixed price; in short, could contract as to everything for the carrying out in the most approved and convenient manner—in the words of the enabling clause—so that “no obstruction may be offered in the using of such railway in a continuous line of communication.”

I think all such arrangements would be within the powers granted by statute.

I do not think the decision here necessarily depends on the perfect validity of the agreement of December, 1882. All I think it necessary to establish is that the train in question, said to have caused the damage, was lawfully on the line with the consent of the Canada Southern Company. If so, in my judgment, it would have the same right to use fire for the propulsion of a locomotive engine.

The rolling stock was all the property of the Canada Southern Company. It was, by an arrangement with them, run and managed by the foreign company on a division of profits or toll.

I feel most reluctant to apply any different measure of liability to a locomotive managed by foreigners by an arrangement with the Canada Southern Company and one wholly managed by the servants of the latter.

Under the agreement all the running and management were to be done in the name of the Canada Southern Company, which company would be, as to the rest of the world,

the apparent proprietor, and responsible for all injuries to property or person, but in either view it would be a permissive user of a dangerous engine requiring the most careful precautions of management, with responsibility only if negligence were shewn.

Judgment.

HAGARTY,
C.J.O.

I think that very liberal views are, especially of late years, taken by the Courts as to railway arrangements, so long as nothing is done contrary to the legislative powers.

I may refer to the language of James, and Bramwell, LJJ., in *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D. 449.

The power of doing acts and making arrangements, not expressly forbidden, is very fully discussed. Many of the cases are considered by Blake, V. C., in a well considered judgment, in *Campbell v. Northern R. W. Co.*, 26 Gr. 522.

I must repeat that I base my judgment on the point that when a locomotive owned or managed by the foreign company is running on the Canadian line with the express assent of the latter company, given under this statutable power, no greater liability as to damages done by sparks therefrom is incurred than in the case of an engine under the sole management and control of the Canada Southern Company.

I do not think it necessary further to criticize the agreement actually made in all its provisions.

This is not a proceeding or information by the Attorney-General against the railway company for infringement of its chartered powers, or for acts done in excess thereof.

I cannot place the plaintiff in any similar position, nor can I believe that when our Legislature gave these large powers of arrangement with foreign companies as to running trains on Canadian lines, it did not at the same time render it lawful for the foreign train to use fire for propulsion, with the same immunity from liability except in the case of proved negligence.

Appeal allowed in part with costs,
HAGARTY, C. J. O., *dissenting.*

GRANT V. NORTHERN PACIFIC JUNCTION RAILWAY
COMPANY.

*Railways—Carriers—Connecting Lines—Misdelivery of Goods—Principal
and Agent—Consignor and Consignee.*

Statement. THIS was an appeal by the defendants from the judgment of the Chancery Division, affirming that of STREET, J., reported 22 O. R. 645, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 19th of March, 1894.

J. McGregor and R. G. Smyth, for the appellants.

W. Nesbitt, and T. Wells, for the respondents.

At the conclusion of the argument the appeal was dismissed with costs.

INNES ET AL. V. FERGUSON.

Statute of Limitations—Prescription—Easement.

The time for acquisition of an easement by prescription does not run while the dominant and servient tenements are in the occupation of the same person, even though the occupation of the servient tenement be wrongful and without the privity of the true owner.

Judgment of the Chancery Division reversed.

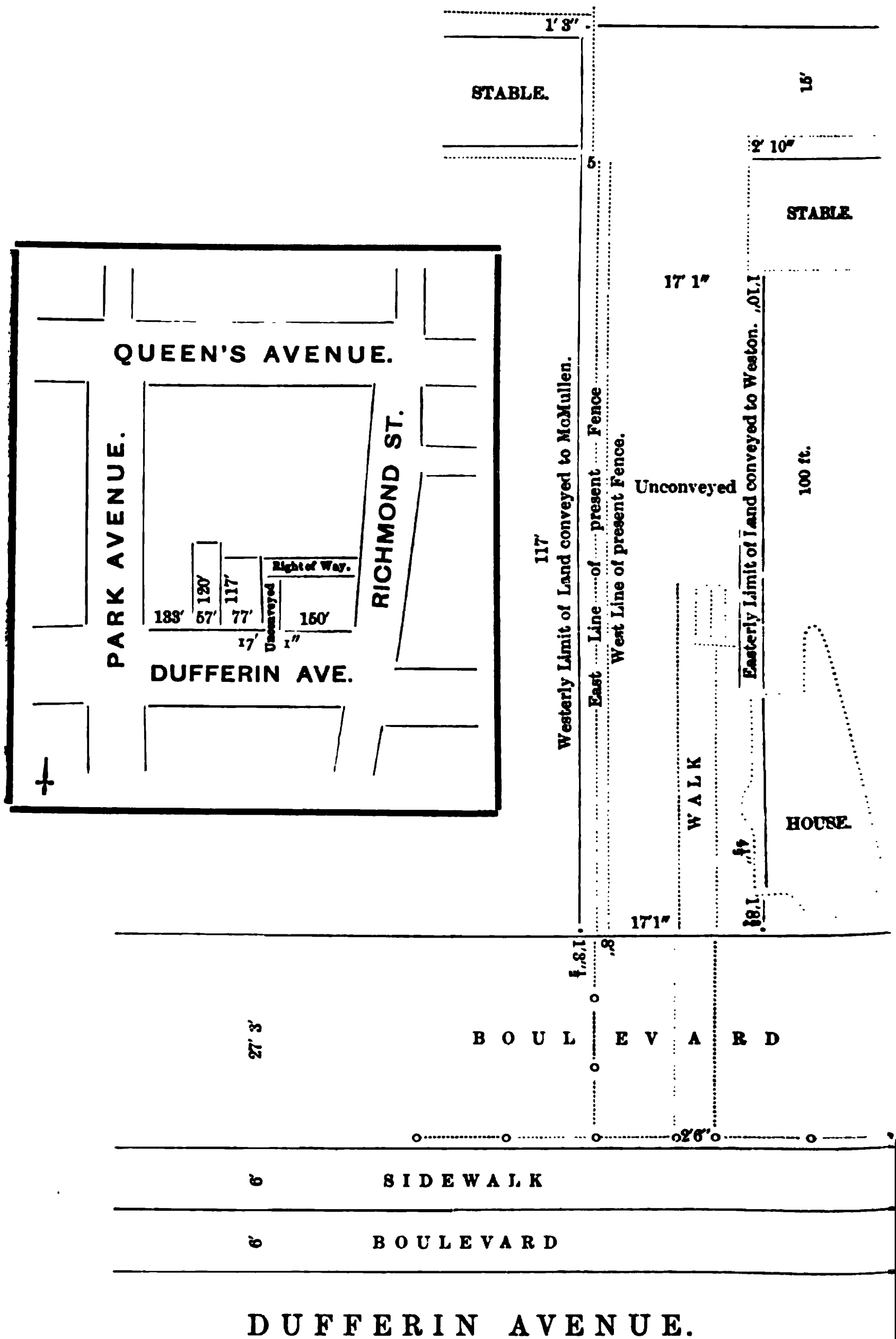
THIS was an appeal by the plaintiffs from the judgment of the Chancery Division. Statement.

The action was brought by the rector and churchwardens of St. Paul's church, London, to recover possession of a strip of land on Dufferin avenue in that city, and was tried at London, on the 5th and 6th of October, 1891, by MACMAHON, J., who, on the 2nd of April, 1892, delivered the following judgment in the plaintiffs' favour.

MACMAHON, J. :—

It was admitted that the church of St. Paul owned the block of land as described in the grant from the Crown as follows :—" Bounded on the east by the western limit of Clarence street, on the west by the eastern extremity of Mark lane, on the north by the southern limit of Duke street, and on the south by the northern limit of North street."

The block of land owned by the church of St. Paul, and the piece of land in dispute, are shewn on the plan :



The Lord Bishop of Huron and the churchwardens of the church of St. Paul, by several conveyances, conveyed to Thomas McMullen, commencing at the distance of 133 feet west from the westerly limit of Clarence street, 57 feet on the south side of Duke street, by a depth of 120 feet, and adjoining such 57 feet an additional 77 feet to the west thereof, by a depth of 117 feet. The last conveyance to McMullen is dated August, 1865, of the 77 feet by 117 feet.

Judgment.
MACMAHON,
J.

On the 22nd of February, 1865, the rector and churchwardens conveyed to Peter Weston a part of the said block by the following description :—"Commencing at the north-west corner of said block, thence easterly along the southerly limit of Duke street 150 feet; thence southerly parallel to Clarence street 100 feet more or less, to the northerly limit of a lane of 15 feet in width running from Mark lane parallel to Duke street aforesaid; thence westerly along said northerly limit of said lane to the easterly limit of Mark lane; thence northerly along the easterly limit of Mark lane to the place of beginning; together with a right of way in, over and upon the said lane, together with all the appurtenances thereunto belonging or appertaining."

The conveyances in favour of McMullen and Weston left a strip of 17 feet in width between their two properties undisposed of and unconveyed by the church of St. Paul.

On the 3rd of October, 1865, McMullen conveyed the westerly 65 feet of the 134 feet owned by him on Duke street to the defendant John Ferguson.

Weston, by deed dated the 19th of January, 1883, conveyed the easterly 40 feet of his land to Sanford Granger, described as commencing at 110 feet from the north-west corner of said block and running easterly along the southerly limit of Dufferin avenue 40 feet more or less, to the westerly limit of a lane 15 feet in width (being the land in dispute in this action).

The said 40 feet so conveyed to Granger was by several mesne conveyances vested in the defendant John Ferguson, in September, 1886.

Judgment. five years. The boulevard in front is there for two or three years; I paid no attention to the time it was laid out. The house was built before, but I can't say when. The property in dispute, as a 15 foot lane, can be used as a lane from Dufferin avenue now, and has always been open except for the bar which I spoke of. I always had an idea it was meant for a way into the church property; never disputed that, but except by persons on foot, and by hauling wood at the back from Richmond street, it has not, to my knowledge, been used for a lane in five years past.'

MACMAHON,
J.

On the 8th July, 1890, the solicitors for the plaintiffs wrote to the defendant John Ferguson, complaining that he was building on certain portions of the cathedral block, which belonged to the church, and that he (Ferguson) was taking possession of the 17 feet, and on behalf of the rector and churchwardens the solicitors demanded a restoration to the church of the possession of the property which it was claimed Ferguson had illegally taken possession of, and he was also called upon to remove such portions of the buildings as he had wrongfully placed there. No attention was paid to, or any answer made to the communication, and on the 15th of May, 1891, this action was commenced.

I find that the church sold and conveyed (out of a total frontage of 434 feet on Dufferin avenue) 417 feet, leaving 17 feet unconveyed. Of this 17 feet, 1 foot 11½ inches were included within McMullen's fence after his purchase which have been in possession of John Ferguson since 1865, and as to this 1 foot 11½ inches the plaintiffs are barred by the Statute of Limitations. The uncontradicted evidence of the architect of the dwelling erected by Ferguson on the 40 feet formerly owned by Weston, was that the main wall on the east side of such building was built on the line of the fence erected by Weston, which encroached 1 foot 8¾ inches on the unconveyed 17 feet, and so has also been lost to the plaintiffs by the statute.

The bay window and chimney of the dwelling erected on the west, projects over this line 4½ inches; the eaves on

the east side of the house also project several inches. The steps leading to the side entrance on the east, project 3 feet, and the stable in the rear projects 2 inches on this piece of land over the boundary fenced in by Weston.

Judgment.

MACMAHON,
J.

It was urged by Mr. Bayly for the plaintiffs, that Ferguson, not having had the use of this piece of land as a right of way for forty years, had not acquired an indefeasible easement thereof, under section 35 of R. S. O. ch. 111; and that his acts in encroaching thereon, by the buildings above referred to, and by erecting the barriers in the street, shewed an intention to abandon it as a right of way; and that he was taking possession of it as his private property, which would have resulted in a few years in acquiring title thereto by length of possession.

I find as a fact that the defendant did not himself intend to use any portion of this as a right of way except the 2 feet 6 inches as a foot path for pedestrians, and that he erected the barrier at the sidewalk in the street between the street line and Dufferin avenue, so as to prevent the space between his own residence and that occupied by his son J. H. Ferguson, from being used as a right of way, and that he has for the past five years been using the same as his private grounds.

There was, according to my view, no interruption within the meaning of the Act. See *Carr v. Foster*, 3 Q. B. 581; *Regina v. Chorley*, 12 Q. B. 515; *Ladyman v. Grave*, L. R. 6 Ch. 763. But there was a voluntary discontinuance or cesser for a period of four years by Ferguson of the user of this right of way except as already indicated by the foot path running from Dufferin avenue to the house occupied by James H. Ferguson, unless it could be said that the use by Ferguson of the other portion of the vacant space by his passing from his house to that occupied by his son, could be considered to be a user of the right of way as a continuous user of the easement that had been acquired. I have found that the dwelling erected by Ferguson on the 40 feet acquired from Weston, projects for some inches on to this land and so is a continuous trespass thereon.

Judgment. I find that by putting up the railing or fence at the
MACMAHON, J. boulevard, Ferguson has closed up as against St. Paul's church (the owner of the fee), what he (Ferguson) claims is a right of way.

There must be judgment for the defendant James H. Ferguson, dismissing the action as against him without costs, and there will be judgment for the plaintiffs as against John Ferguson, compelling him to remove the obstructions created by the erection of the dwelling house and other buildings on the land in question, and to remove the fence so as to give from Dufferin avenue a clear right of way through the piece of land already referred to.

The plaintiffs are entitled to their costs as against the defendant John Ferguson.

This judgment was reversed by the Chancery Division, and the plaintiffs appealed, the appeal being argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 9th of March, 1894.

Bayly, Q. C., for the appellants. By the defence the defendants expressly claimed only a right of way over 15 feet, and disclaimed any other interest therein, and the only question raised was, whether they were or were not entitled to use the 15 feet as a lane or right of way, and the only claim which the defendants assert they have established to use the land as a lane or right of way is by prescription. But they have failed to make out a prescriptive right. The plaintiffs admit that the defendant John Ferguson acquired an inchoate right of way over the 15 feet, as appurtenant to his land on the easterly side thereof, but such right of way never became indefeasible, and has been lost by non-user since the year 1886, when he made a boulevard in front and used the land thenceforth as a part of his private grounds. The defendant John Ferguson never acquired a right of way by prescription over the 15 feet as appurtenant to his land on the westerly side thereof, as it is clear that he only used it from the year 1865 until the year 1878, when he laid out a lane of 10 feet in width,

and used it instead. If, however, John Ferguson acquired an inchoate right of way by prescription over the 15 feet as appurtenant to his land on the westerly side thereof, it never became an indefeasible right, but was lost in 1886, when he made the boulevard : *Ackroyd v. Smith*, 10 C. B. 164; *Ward v. Robins*, 15 M. & W. 237; Leith's Blackstone, 2nd ed., pp. 464, 465; *Moore v. Rawson*, 3 B. & C. 332; *Lowe v. Carpenter*, 6 Exch. 825. Argument.

T. H. Purdom, for the respondents. The lane, or right of way, has been used since 1866 with both properties. The erection of the boulevard rail did not interfere with the use of the right of way, for all purposes for which it was required. People walked out and in at the front, and drove out and in at the back. It is the only means of access to the easterly house, and the defendants had no idea of abandoning it as a right of way when the railing was erected. The rear part of it is still used in going in and out to the barn of the defendant on the easterly side. An interruption within the meaning of the Act must be by a third party, and an abandonment must be by the defendant himself, and the defendants never abandoned or ceased to use the right of way : *Carr v. Foster*, 3 Q. B. 581; *Regina v. Chorley*, 12 Q. B. 515; *Ladyman v. Grave*, L. R. 6 Ch. 763.

Bayly, Q. C., did not reply.

June 30th, 1894. The judgment of the Court was delivered by

MACLENNAN, J. A. :—

The argument before us, and a subsequent careful perusal of the evidence, have led me to the conclusion that we must reverse the judgment of the Chancery Divisional Court, and restore the judgment of the trial Judge, Mr. Justice MacMahon.

The learned Chancellor, who delivered the judgment of the Divisional Court, has not dealt expressly with the con-

Judgment. MACLENNAN,
J.A. tention that the defendant had taken possession of the land in dispute, and that thereby the easement claimed by him had been suspended or extinguished, and I should judge that the effect of such possession on the case had not been distinctly presented either to the Divisional Court or to Mr. Justice MacMahon.

The main facts are very fully stated in Mr. Justice MacMahon's judgment, and need not be repeated here.

Were it necessary to decide the point, I should be of opinion that no easement of a way had ever been acquired as appurtenant to the property lying to the west of the land in question. Peter Weston acquired that parcel in February, 1865, and entered into occupation six months afterwards; and although he used the disputed land as a way until 1878, he swears most distinctly that he did not use it after that, having in that year laid out a lane farther west on his own ground which he used afterwards. This is not contradicted by any one; for his son, who speaks in general terms in his examination in chief, admits on cross-examination that his knowledge does not extend to the period subsequent to 1878.

There is no evidence that the subsequent owners, between Weston and the defendant John Ferguson, made any use of the disputed land for a way or otherwise. John Ferguson acquired it on the 28th September, 1886, and even if he had used it for a way from that time till the commencement of the action, the whole period would be less than eighteen years. The evidence, therefore, fails to shew a use of the way for a sufficient time to establish an easement appurtenant to the land lying to the west.

The case is quite different as to the land to the east. Curiously enough the statement of defence claims no easement of a way appurtenant to the land on the east side, but no objection was raised on that ground, and the evidence shews that from the time he acquired the land to the east on the 3rd of October, 1866, until some time in the year 1886, he exercised a right of way over it in connection with that land for the purposes of his business as an un-

dertaker. He has, therefore, shewn that at all events, as appurtenant to his land on the east side, he has enjoyed an easement of a way for twenty years; and it becomes necessary to consider the effect of what has taken place since that period; for to entitle him to succeed, he must still shew that he has enjoyed it as of right for twenty years next before the commencement of the action: R. S. O. ch. 111, secs. 35, 37, 39; Gale's Law of Easements, 6th ed., p. 181, and cases cited, *n.* (f); Goddard's Law of Easements, 3rd ed., p. 197 *et seq.*

Judgment.

MACLENNAN,
J.A.

I think the evidence is clear that in or about the year 1886 or 1887, the defendant, instead of merely using a way over the disputed ground, entered into possession of it, and continued in possession from that time until the commencement of the action.

When the defendant bought the adjacent land on the west of the disputed ground from Weston in 1886, the two parcels were separated partly by a fence and partly by the gable of a building which had been erected by Weston. The defendant immediately removed the fence and the old building, and erected a double brick dwelling-house on the Weston land, placing the main wall of the east gable upon the ground previously occupied by the old fence and by the old house. He also erected some out-buildings, a barn or stable, at the rear of the lot up to the same line.

There are windows in the east gable looking out upon the disputed ground, and back of the main building there is a verandah raised somewhat above the level of the ground, with steps leading down upon the disputed ground. There is also a door from the verandah into the dwelling-house. Soon after the dwelling-house was built, the defendant sodded the boulevard in front, and also the disputed land; and he put up the bar in front which closed up all entrance to it from the street, except a passage of two or three feet, which could be used only by pedestrians. Although the bar was outside of the boulevard and at a distance of 27 feet from the front of the disputed land, it was an effectual obstacle to all entrance from the travelled

Judgment. case like the present, where the possession was wrongful,
MACLENNAN, and without the privity of the true owner. The principle
J.A. of the decided cases is, however, as applicable to the present case as to the others, which is the inconsistency or incompatibility of an easement with the actual possession of the land both in the same person. Possession is the larger right and includes or swallows up, as is said in some of the cases, all easements, they being in the nature of profits of the land. The effect is a species of merger, which, when both tenements become vested in fee simple in the same owner, operates as an extinguishment of all easements for ever.

In the present case the possession of the defendant was in fee simple, but according to the passage cited from Co. Lit. 313 (b), by Mr. Gale (6th ed., at p. 502) the estate of a disseisor, although being in fee, is not so perdurable an estate as to make an extinguishment, and would, therefore, operate merely as a suspension of the easement during its continuance.

I think, therefore, the defendant's possession during the four years next before the commencement of the action, was at least a suspension of the easement during that period, and defeats his claim.

The plaintiffs are, therefore, entitled to recover the whole of the land in dispute, free from any easement of a way, except those parts which the defendant has acquired absolutely by length of possession.

There is no dispute as to what the defendant has thus acquired on the east side; but on the west side, the trial Judge and the Divisional Court differ. The former held that the defendant had acquired title only to the eastern surface of the main wall, or to a portion of the original parcel of 17 feet 1 inch, 1 foot 8 $\frac{3}{4}$ inches in width; and that the projection of the chimney, and the steps, and the eaves and the barn or stable beyond that line must be removed. The Divisional Court, on the other hand, held that the defendant had acquired 16 inches more of the

plaintiff's land, and that the only encroachment by building was the steps to the extent of 21 inches.

Judgment.

MACLENNAN
J.A.

I have read the evidence with very great care, and I think, with great respect, the effect of it is that the eastern surface of the chimney projection produced parallel to the original line, corresponds with the outer limit of the fence, etc., erected and maintained by Weston, and is, therefore, now the true boundary between the properties resulting from length of possession, and that all projections or encroachments of buildings or steps, etc., beyond that line, and no more, should be removed. I think that is the effect of the evidence of the defendant and of the architect who laid out the building, and also of the builders who were engaged in its erection, which is not qualified by any other evidence.

I am, therefore, of opinion that the appeal should be allowed, and that the judgment of the trial Judge should be restored with the above variation.

See further, Woolrych's Law of Ways, p. 117 ; 5 Chitty's Statutes, 4th ed., p. 402, *n* (p.); Gale's Law of Easements, 6th ed. p. 163, *n* (f) ; pp. 177-8, *n* (d) and p. 181, *n* (f.)

Appeal allowed with costs.

KERRY V. JAMES ET AL.

Bills of Sale and Chattel Mortgages—Agreement to give Security—R. S. O. ch. 125, sec. 6—Assignments and Preferences—55 Vic. ch. 26, sec. 2 (O.).

An assignee for the general benefit of creditors is, by virtue of 55 Vic. ch. 26, sec. 2 (O.), entitled to take advantage of irregularities or defects in a chattel mortgage made by the assignor to the same extent as an execution creditor where such mortgage is by reason of such defect "void against creditors."

As against such an assignee an oral agreement, of which he has notice, by the assignor to give to an endorser a chattel mortgage to secure him against liability, will be enforced.

Where a chattel mortgage is taken to secure a debt, the time for payment may be extended beyond a year.

Judgment of ROSE, J., affirmed.

Statement. THIS was an appeal by the defendant Barber from the judgment of ROSE, J.

The appellant was the assignee for the general benefit of creditors of his co-defendant James under an assignment made, pursuant to the Act, on the 15th of November, 1893. On the 12th of September, 1893, James gave to the plaintiffs a chattel mortgage on all his stock-in-trade to secure his indebtedness to them amounting to \$907.76, payable in instalments extending over a year. On the 6th of November, 1893, the plaintiffs endorsed for the accommodation of James a note for \$450, payable at one year from that date, he at the time orally promising to give to them a second chattel mortgage on his stock-in-trade to secure them, but instead of doing this he made the assignment to Barber, who took possession.

The plaintiffs then brought this action claiming a lien for \$907.76 and \$450, alleging that Barber had notice of the agreement. The action was tried before ROSE, J., at London, on the 11th of January, 1894, the defendant not being represented, and judgment was given in the plaintiffs' favour. The evidence as to notice was somewhat confused, but the learned Judge held that Barber had notice and was in no better position than his assignor.

Barber appealed, and the appeal was argued before Statement.
HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.,
on the 25th of May, 1894.

The main ground of appeal was that the affidavit of *bona fides* was defective. The chattel mortgage relied on at the trial and filed as an exhibit purported to be a duplicate original. After the argument, however, the plaintiffs' counsel found that the original mortgage filed did not contain the error complained of, and the Court allowed this mortgage to be put in. It was also contended that the mortgage was void because the time for payment extended over a year, *O'Neill v. Small*, 15 C. L. J. 114, being cited, and that the agreement was void as against an assignee, 55 Vic. ch. 26, sec. 2 (O.), being referred to.

R. S. Cassels, for the appellant.

Gibbons, Q. C., for the respondents.

June 30th, 1894. The judgment of the Court was delivered by

OSLER, J. A. :—

It would seem that an assignee for the general benefit of creditors may now, so far as the recent amendment, 55 Vic. ch. 26, sec. 2 (O.), of the Act respecting Mortgages and Sales of Personal Property, R. S. O. ch. 125 extends, take advantage of irregularities and defects in a chattel mortgage, arising from non-compliance with the requirements of the Act, in the same way that a creditor may do, so that where the instrument would, in the words of the Act, be "void against creditors," it may also be void as against the assignee.

As to the objection that the mortgage is void because the time for payment is more than a year from the date, it is perhaps enough to say that the statute affords no foundation for it. It has been said that because the mortgage is required to be renewed at the end of a year from its

Judgment.

OSLER,
J.A.

registration it ought to be assumed that the Legislature intended that the debt should be made payable at that time; but this would be to add words to the Act, and impose a condition which the Legislature has not, in the case of a mortgage made under the 2nd section, thought fit to impose. There is nothing else in the mortgage itself or the affidavits which can be called a defect, and therefore, as to that part of the case the judgment must be affirmed.

Then as to the agreement to secure the plaintiffs' endorsement. This comes within the 6th section of the Act, R. S. O. ch. 125. It is not necessary that it should have been in writing, and I agree with the learned trial Judge that it was sufficiently proved, and also that the defendant, the assignee, had notice of it, if that be material in the case of an assignee for creditors.

It is contended that if the mortgage had actually been executed by the defendant, it would have been void, and therefore that the agreement to give it cannot be enforced because it would have the effect of securing the endorsement of a note or liability extending for a longer period than one year from the date of the mortgage, the days of grace being added to the term of the note.

Apart from any difficulties which the Assignments and Preferences Act and its amendments may throw in the way of enforcing such an agreement, there can be no doubt of its validity, and of the plaintiffs' right to the assistance of the Court to compel its execution, or award damages for its breach. The case of *Clarkson v. Sterling*, 15 A. R. 234, and the authorities there cited, may be referred to on this point, though the agreement there in question was not one to secure an endorsement. There is nothing in any of the statutes referred to which forbids such a mortgage to be taken as the 6th section of the Bills of Sale and Chattel Mortgage Act provides for. It must comply with the requirements of that section, and must not be open to objection as an unjust preference within the meaning of the other statute.

I quite agree that a transaction of this kind, particularly

where it is based upon a verbal agreement, ought to be closely scrutinized, and the evidence in support of it clear, for it is evident that there are many opportunities for collusion connected with it. There is nothing in the evidence here, however, to suggest anything of that kind, and we cannot assume that it would have had a different appearance if the defendant had contested the case at the trial.

Judgment.

OSLER,
J.A.

Now, what the 6th section says is, that in case of a mortgage for securing the mortgagee against the endorsement of any bills or notes or other liability by him incurred for the mortgagor not extending for a longer period than one year from the date of the mortgage, the mortgage shall be valid. It is the date of the mortgage not the date of the note which governs. Even were it otherwise in the present case, and the mortgage was necessarily to bear the same date as the note, I should be disposed to hold that the statutory addition of the days of grace ought to make no difference, and that we should regard the liability as one for the period expressed on the face of the contract creating it. But inasmuch as the point of time from which the year is to be reckoned is the date of the mortgage, and there is no reason why it should be executed on the very day the endorsement was made, and in this case could not have been executed, had the defendant performed his promise, for three or four days afterwards, the objection clearly fails.

Although the Act 55 Vic. ch. 25 (O.), enacts that the word "creditor" in section 2 of the Assignments and Preferences Act, R. S. O. ch. 124, as amended by 54 Vic. ch. 20 (O.), shall include an endorser of a note who would upon payment become a creditor of the person giving the preference within the meaning of sub-section 2 of section 2, it is evident that it was not intended to apply to the case of a security given contemporaneously or in pursuance of an agreement contemporaneous with the endorsement. What is aimed at by the Act is to prevent a person who has become a surety without taking security for his indemnity,

Judgment. afterwards when his liability as such has become fixed
OSLER, and he is potentially a creditor, procuring security from
J. A. his principal. The object of the Act was to meet such cases as *Hope v. Grant*, 20 O. R. 623, where it was held that a chattel mortgage or other security taken by a person in that position was not within chapter 124.

The appeal ought, in my opinion to be dismissed. I see no reason to interfere with the costs—the judgment as to which follows the direction endorsed by the learned Judge on the record. Had the defendant appeared at the trial, and pointed out to the Judge the objection so much relied on, to the affidavit annexed to the chattel mortgage, judgment would probably have been delayed until a correct copy of the mortgage could be procured, and thus the appeal on that point would have been unnecessary.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed with costs.

MCMILLAN V. MCMILLAN.

Mortgage—Priorities—Assignment.

A testator devised the north half of his farm to one son and the east half of the south half to another son, the latter half being subject to mortgage. The devisee of the north half made several payments to the mortgagees, without any demand from them, reducing the mortgage debt to about \$100. The devisee of the east half of the south half gave a mortgage on his land, this mortgagee, before advancing the money, communicating with the former mortgagees and obtaining from them a statement shewing the balance due to be about \$100, and then registering the mortgage. Subsequently the owner of the north half paid this balance and took an assignment expressed to be in consideration of \$1.00, and in these proceedings he claimed that he was entitled to hold the assignment for the full amount paid by him:—

Held, per HAGARTY, C. J. O., and OSLER, J. A. That there was nothing to shew that the payments, other than the last, were made on the faith of getting the assignment, and that even if they had been so made the right to an assignment was an equitable one and could not prevail against the duly registered second mortgage.

Per BURTON, J. A. That, on the evidence, it was not shewn that the payments had been made with the intention of taking an assignment.

Per MACLENNAN, J. A. That the payments by the devisee of the north half were properly made in view of the possible resort to the north half in case of deficiency in value of the south half but that the equitable right could not prevail against the duly registered second mortgage.

In the result the judgment of MEREDITH, J., 23 O. R. 351, was affirmed.

THIS was an appeal by the plaintiff from the judgment of MEREDITH, J., reported 23 O. R. 351. The facts and arguments are sufficiently stated in that report and in the present judgments. Statement.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 22nd and 23rd of May, 1894.

Hoyles, Q. C., for the appellant.

W. H. Blake, for the respondents.

June 30th, 1894. BURTON, J. A.:—

The evidence sustaining the contrary view to that taken by the learned Judge ought to be very clear and convincing before we should be justified in interfering with his judgment.

Judgment.

OSLER,
J.A.

such a claim. I am not prepared to admit that even as against Hugh McMillan, in the absence of evidence that the appellant was making the payments in order to protect himself or acquire some right, they could be charged against his land. Though he supplied the moneys which went to the company he did not pay them to the company, nor were they paid for him. They were the payments of a volunteer and the assignment could not, in my opinion, be enlarged, *a fortiori* not against the second mortgagee, contrary to its express terms, so as to include them.

MACLENNAN, J. A. :—

Ewan McMillan was in his lifetime the owner of the west half of lot 30, in the third concession of Lochiel, and on the 27th of October, 1876, mortgaged the south half thereof to a loan company to secure \$471.60 payable in two annual instalments. The mortgage was registered on the 31st October afterwards.

Ewan McMillan made his will on the 18th of February, 1878, whereby he devised to his eldest son, Allan, the plaintiff in this action, the north half of his lot in fee subject to the maintenance and support of the testator's mother and wife for life, and of his daughters Catherine Ann and Mary Theresa until married or otherwise provided for, and also subject to the maintenance and support of his son Hugh Dougald until the age of eighteen. He also devised the west half of the south half of his said land to his son John, in fee; and to his son, the defendant Hugh James, in fee, the east half of the south half thereof, and he gave all his cattle and other chattel property to his wife.

The testator died on the 24th March, 1878, and the will was registered on the 11th November afterwards. There are no executors named in the will, and it does not appear that it was ever proved.

The testator made one payment on the mortgage in his lifetime, and after his death various payments were made

thereon by different persons, but it was found by the Master, and very fairly admitted by Mr. Blake on the argument before us to be the result of the evidence, that they were all made with the plaintiff's money, with the exception of fifty dollars paid by Mr. Tiffany with money retained for the purpose out of the money advanced by the defendant R. R. McLennan on the mortgage hereinafter mentioned.

Judgment.

MACLENNAN,
J.A.

The last payment made by the plaintiff was on the 11th December, 1890, when he paid \$97.35, the balance then due to the company, and \$5 for an assignment of the mortgage to himself, which he obtained, dated the 22nd December in the same year, which was registered on the 13th April, 1891. All the payments made by or on behalf of the plaintiff, except the last, were made to the company without any stipulation for an assignment, or any intimation on whose behalf the payments were made, and they were received by the company and credited on the mortgage generally.

The last of the payments made by the plaintiff, except the final one, was made on the 26th October, 1885, and in September of the following year the defendant Hugh, the devisee of the east half of the land comprised in the mortgage, applied to the company for a statement of arrears on the mortgage, and on the 16th of September the company's manager sent him a statement shewing the balance to be \$101.96, and saying that was the amount required to discharge the mortgage if paid at once.

The reason for Hugh McMillan obtaining this statement was that he was about to apply to the defendant R. R. McLennan for a loan of \$550 on his half of the land. This he did on the 18th of September through Mr. Tiffany. On the 23rd of September Mr. Tiffany wrote to the company saying Hugh had shewn him the statement of the 16th of September; that Hugh was the devisee along with another of the mortgaged land; that Hugh had paid the greater part of the money, and desired to obtain an assignment of the mortgage for his protection in case he paid the balance, and asking if the company would give

Judgment. him one. The company answered expressing willingness
MACLENNAN, to assign on receiving the balance due, but without cove-
J. A. nants on the part of the company. Neither Hugh's letter nor Mr. Tiffany's letter to the company says anything about an intention to make another mortgage, or that the statement was required for that purpose.

The mortgage to McLennan was completed, bearing date the 22nd September, 1886, and was registered on the 30th September. The sum of \$550 was advanced for three years, and Mr. Tiffany retained in his hands \$101.96, wherewith to pay off the old mortgage, and to obtain an assignment.

Mr. Tiffany did not pay the balance due to the company at that time, or any part thereof, but on the 12th April, 1890, he paid fifty dollars on account, as already mentioned, and matters remained in that position until the 11th December, when, as above stated, the plaintiff paid the balance, \$97.35, and obtained and registered an assignment to himself.

There is nothing to shew that when the defendant McLennan took and registered his mortgage and advanced his money thereon, either he or Mr. Tiffany had any notice or knowledge by whom or with whose money the prior payments had been made on the mortgage, or that they had not been made by Hugh J. McMillan. On the other hand, they were both well aware, or at all events they both had legal notice both by registration and otherwise, of the prior mortgage, and that there was a balance of \$101 or thereabouts due thereon.

The present action is brought by the plaintiff as assignee of the company's mortgage, and he contends that having obtained an assignment of the mortgage and of the legal estate of the land, and the prior payments having been made with his money, he is entitled to priority over the defendant McLennan, not merely for the sum he paid on obtaining the assignment, but also for the prior payments made by him.

The learned Judge of the County Court at Cornwall, to

whom the action was referred, upheld the plaintiff's contention, but was reversed by Mr. Justice Meredith on appeal, and his finding was reduced to the amount of the last payment, viz., \$97.35 and interest.

Judgment.

MACLENNAN,
J.A.

I am of opinion that the judgment is right.

By section 36 of the Wills Act, R. S. O. [1877] ch. 106, which was in force when the testator Ewan McMillan died, the testator's mortgage debt became primarily chargeable on the mortgaged lands, and ought therefore to have been paid by Hugh J. McMillan and his brother John McMillan, to each of whom one-half of the land covered by the mortgage was devised. Inasmuch, however, as the mortgage contained a covenant for payment, the mortgaged land might turn out to be an insufficient security, and the plaintiff's land might sooner or later have to be resorted to for payment. The mortgage appears to have been in the nature of a building society mortgage, and may have contained stipulations for fines and penalties for non-payment, and it may have been only an act of prudence on the plaintiff's part, having regard to his own interest, to see that the payments were regularly made. The plaintiff, therefore, after his father's death was not a mere stranger to the mortgage. He was a person who had a legal interest in paying it off, and from whom the company was compellable to receive it.

An argument in favour of the plaintiff's contention was rested on the rights of his mother, the testator's widow, to whom the plaintiff appears to have given or sent the money, for the purpose of making the payments, or some of them, and who saw they were made through Mr. Munro. The widow had barred her dower in the mortgage, and although it was made before the Act 42 Vic. ch. 22 (O.), yet as her husband had died seized, she was entitled to redeem the mortgage in respect of her dower: *Robertson v. Robertson*, 25 Gr. 486, and other cases; *Martindale v. Clarkson*, 6 A. R. 1; and as all a deceased debtor's assets are liable for his debts, the plaintiff Allan had an interest in paying the debt in question, for he was a devisee of the north half of

Judgment. the lot. The mortgagee was not obliged to look to the
MACLENNAN, land. He could proceed on his covenant, and could have
J.A. cited the plaintiff and the other next of kin of Ewan to take probate, that he might have his legal remedy.

The widow also stood in the same position as her son, the plaintiff Allan, in respect of the bequest to her of all the testator's cattle, and other chattels, which, if the mortgage debt were not paid, might be made liable for its satisfaction. It is, however, not necessary to rely in any way upon the widow's rights, or upon her connection with the payments which were made, inasmuch as these would not make the plaintiff's position any stronger than it is in itself.

Now, what was the effect of these payments made by the plaintiff, having regard to the fact that he had a right to make them, and that Hugh was now the principal debtor? The plaintiff's land being by law assets for the payment of the mortgage debt, he stood in the position of surety for his brother Hugh, and in respect of each payment which he made he became entitled as against Hugh to a lien upon the mortgaged land as security for repayment. Until the company was paid in full his lien would be subject to the balance still due to them; but when the company was paid off his lien would be a first charge, and he then became entitled under sections 2 and 3 of the Mercantile Amendment Act, R. S. O. [1877] ch. 116, to an assignment of the mortgage, and of the title to the land. If, therefore, McLennan's mortgage were not in existence the plaintiff's right to hold the mortgage for the full amount of his payments would be indisputable, subject, of course, to any question upon the Statute of Limitations as to payments made more than ten years before action.

The next question is whether McLennan can stand any higher than Hugh, his mortgagor, and whether his mortgage is not subject to the equitable lien in favour of the plaintiff to which the land was subject as against Hugh. In the hands of the company the mortgage was only a security for \$97.35; but the plaintiff says that in his

hands it is a security not only for that sum but for all the other sums which he had paid. He makes that out by annexing to the legal title which he acquired by the assignment the equitable lien which he had by virtue of the several payments. But the answer to that is that his equitable lien was unregistered when McLennan obtained and registered his mortgage, and McLennan having no notice or knowledge of it until after such registration, it can have no priority over him. Section 83 of the Registry Act declares that no equitable lien, charge, or interest affecting land shall be deemed valid by any Court in this Province as against a registered instrument executed by the same party, his heirs or assigns. Therefore, as against McLennan's mortgage the equitable lien which the plaintiff acquired against Hugh's land by the payments which he made is void, and invalid.

Judgment.
MACLENNAN,
J.A.

I think for these reasons the judgment complained of is right, and the appeal must be dismissed.

HAGARTY, C. J. O. :—

I agree with my brother OSLER.

Appeal dismissed with costs.

THE MERIDEN BRITANNIA COMPANY V. BRADEN ET AL.

Bills of Sale and Chattel Mortgages—Simple Contract Creditors—"Void as against Creditors"—55 Vic. ch. 26, sec. 2 (O.).

"Void as against creditors" in section 2 of 55 Vic. ch. 26 (O.), which extends the provisions of the Act respecting Mortgages and Sales of Personal Property to simple contract creditors suing on behalf of themselves and other creditors, must be read "voidable as against creditors," and a sale of the mortgaged goods by the mortgagee before an election is made by the simple contract creditors commencing proceedings to attack the mortgage cannot be impeached.

Whether such an action can be brought by a simple contract creditor whose debt is not due, *quære*.

Judgment of ARMOUR, C. J., reversed.

Statement.

THIS was an appeal by the defendants from the judgment of ARMOUR, C. J.

The defendant Braden, on the 8th of February, 1893, assigned his chattels by way of mortgage to the defendants Broadfield & Co., to secure \$1,500, and a further advance up to \$2,500. On the 28th of April, 1893, the mortgagees, pursuant to the power in that behalf conferred upon them by the mortgage in the event which had happened, entered into possession of the stock of goods mortgaged with the assent of the mortgagor, and on the 5th of May, 1893, sold them under the mortgage to the defendant Scott for the price of sixty-five cents in the dollar, and Scott then received and took actual possession thereof, and gave the mortgagees his promissory notes for the purchase money.

On the 6th of May, 1893, the plaintiffs issued the writ in this action claiming that the mortgage was void as against them as creditors for non-compliance with the requirements of the Bills of Sale and Chattel Mortgage Act, and that it was fraudulent and void as contrary to the Statute 13 Eliz. ch. 5, and the Act respecting Assignments and Preferences, alleging that the mortgagees had notice that Braden was insolvent at the time of the execution of the mortgage, and that it was given and taken with intent to obtain an unjust preference over the plaintiffs and other creditors of Braden, and that the sale to Scott

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Judgment. June 30th, 1894. BURTON, J. A. :—

**BURTON,
J.A.**

This is an appeal from the learned Chief Justice of the Queen's Bench Division, setting aside a chattel mortgage by the defendant Braden to his co-defendants McMahon & Broadfield, and the sale made by them to the defendant Scott as void against creditors.

The facts are in a very small compass.

The defendant Braden, on the 8th of February, 1893, executed a mortgage on all his stock-in-trade to the defendants McMahon & Broadfield, and on the 28th of April following they took possession with the consent of the mortgagor, and immediately afterwards sold and transferred the goods and chattels comprised in it to Scott who took possession and delivered over his promissory notes for the purchase money, so that it became a completed transaction on the 5th of May.

On the following day this suit was instituted by the plaintiffs suing on behalf of themselves and other creditors. It is not shewn that the sale was collusive or a sham, but the learned Judge found that at the time the mortgage was given Braden was insolvent within his own knowledge and that of the mortgagees, but that it was given under pressure, and that the transaction was honest enough except in so far as they knew of the insolvency, and that by getting time and more goods both parties believed that the debtor would pull through.

The learned Judge also held that Scott knew that Braden was insolvent, and that as he had purchased under the chattel mortgage, he must be taken to have known of the defect in it and could be in no better position than the mortgagees, and that the mortgage being, as he held, absolutely void as against creditors, these plaintiffs, when they chose to sue, could obtain a judgment to set it aside, being creditors at the time the mortgage was given.

Whether the recent legislation placing cases like the present where no fraud is alleged (but the security taken for a just debt is open to some technical objection) upon

the same footing as suits brought to relieve against fraud is well advised, may be open to question, but there would seem to be no good reason for facilitating the proceedings of creditors to set aside a mortgage honestly given for a just debt—robbing Peter to pay Paul. It is quite true that if the security is defective under the Chattel Mortgage Act, a creditor obtaining execution was entitled to impeach it, but it not unfrequently worked great injustice, and it would seem, as I read the Act, that it may lead sometimes to a good deal of futile litigation. Assume, for instance, that the plaintiff obtain a judgment setting aside the mortgage, but not being in a position to obtain the fruit of it by execution, what either in morals or in law is to prevent the debtor executing a fresh mortgage free from any defect?

Judgment.

BURTON,
J.A.

In the present case the debt was not payable when this action was brought, nor at the time of the trial, although I observe that the plaintiffs did obtain judgment for the amount.

The question for our decision seems to resolve itself into this: whether under the recent enactment a creditor suing on behalf of himself and other creditors occupies any higher or better position than an execution creditor formerly occupied. Until he obtained execution he was not in a position to impeach the transaction, and if before he obtained such execution the mortgagee had realized by sale of the mortgaged goods, he was without remedy.

I think the effect of the legislation is to place a simple contract creditor electing to attack the security, which he can now do by a suit on behalf of himself and other creditors, in the same position as an execution creditor electing to seize.

As at present advised, I am of opinion that the plaintiff cannot impeach the sale to Scott effected before he brought his action; in other words, I am of opinion that the words "void as against creditors," must receive their usual interpretation in Acts of this nature and be read "voidable."

Judgment.

**BURTON,
J.A.**

There must be an election to avoid the deed—and that election was made by the bringing of this action—but before any election the property had passed out of the mortgagees to the defendant Scott.

It seems to me that there is some confusion of ideas in treating the possession as coming within section 4 of the Act. It is conceded, as I understand, that the defect in the mortgage would not be cured by such taking possession, but it would have been equally invalid against creditors notwithstanding such possession. What is relied on is that until avoided the mortgage was good against every one, and that when the plaintiffs elected to avoid, it was too late.

I am of opinion, therefore, that the appeal should be allowed, and the action as against the appellants dismissed.

OSLER, J. A. :—

[The learned Judge stated the facts as above set out, and continued :]

The plaintiffs having failed to prove that the mortgage was void against creditors under the Statute of Elizabeth, were driven to rest their case upon the recent amendment of the Chattel Mortgage Act, 55 Vic. ch. 26 (O.), and on the Act to amend R. S. O. ch. 124, respecting assignments and preferences, 54 Vic. ch. 20 (O.).

The Bills of Sale and Chattel Mortgage Act, sec. 2 enacts that if the mortgage and affidavits are not registered as thereinbefore provided, the mortgage shall be absolutely null and void as against creditors of the mortgagor and subsequent purchasers or mortgagees in good faith for valuable consideration.

The word “creditors” in this and other parts of the Act has hitherto always been construed to mean execution creditors, creditors who were in a position to seize the goods mortgaged or sold. Until there were creditors who had acquired that character there was no reason why any honest dealing between the owner and another creditor should be interfered with, or why the creditor who had obtained his mortgage should not realize upon it, as he could not there-

by be said to be hindering, delaying, or interfering with other creditors, there being none who could say that non-compliance with the statutory formalities entitled them to assert any better right to the goods than the creditor who had thus obtained a mortgage, irregular, though it might be, in form. In short, so long as the mortgagor was at liberty to mortgage or otherwise dispose of the goods, the mortgagee, holding what as between them was a valid transfer, was equally at liberty to do so. This section has now been amended by 55 Vic. ch. 26, secs. 2 and 4 (O.). By section 2, the words "void as against creditors," in the principal Act have now in two particulars an extended meaning given to them: (1) They shall extend to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors; and (2) to any assignee for the general benefit of creditors under R. S. O. ch. 124, as well as to creditors having executions against the goods and chattels of the mortgagor or bargainor.

Judgment.

OSLER,
J.A.

These two classes are placed in the same position as the execution creditor as regards the right to attack the instrument in respect of formal defects.

Where an execution creditor could have seized and could have met the mortgagee's claim under the mortgage by shewing its non-compliance with the Act, there a simple contract creditor, not suing merely on his own behalf, but suing on behalf of himself and all other creditors, can do so too. But whatever would be an answer to the former seeking to assert these defects in, and thus to avoid the instrument, must, in my opinion, be equally an answer to the latter, because the true construction of the Act is that the instrument is not void, but voidable only at the instance of the creditor who is in a position to avoid it.

Now, if before an execution came in, the mortgagee had sold the goods out and out under the power of sale in his mortgage, I take it to be clearly settled that the execution creditor could not set up any defects in the mortgage to impeach such a sale. As between debtor and creditor the mortgage was then in force, and by the sale the goods

Judgment.

OSLER,
J. A.

ceased to be comprised in the mortgage. They passed into the hands of a subsequent purchaser whose title was not dependent upon the continued subsistence or efficacy of the mortgage, and he took it at a time when there was no execution under which the title of the person selling to him was liable to be impeached. This is substantially what is said by Lord Selborne in the case of *Cookson v. Swire*, 9 App. Cas. 653, and Lord Blackburn's language in the same case is equally applicable to our Act. The creditor, suing as these plaintiffs are suing, can be in no better position than the execution creditor if his action has not been commenced before the mortgagee has sold the goods comprised in the mortgage, nor is there any reason why he should be. The goods have passed away from the mortgage; they are held under another title acquired under an instrument which was perfectly good and valid when the mortgagee acted upon it by taking possession under it and selling. In the present case there was an out and out sale by the mortgagees, undoubtedly *bond fide*, before, if even only the day before, the action was brought, and possession was at once taken by the purchaser. The 2nd section of the new Act does not, in my opinion, enable the plaintiffs to defeat that sale.

Nor do I see how the 4th section of the Act assists them. It enacts that the mortgage or sale declared by the Act to be void as against creditors or subsequent purchasers shall not, by the subsequent taking of possession of the things mortgaged or sold, by or on behalf of the mortgagee or bargainee, be thereby made valid as against the persons who became creditors or purchasers or mortgagees before such taking of possession. It is enough to say as to this section that where the goods of which the mortgagee may have taken possession under a defective mortgage have passed out of his possession by a subsequent sale so that the title to them no longer depends either upon the mortgage, which is spent and satisfied, or upon his possession, nothing remains upon which the section can operate. The plaintiffs did not seek to avoid it until it was too late, and

when the sale took place there was no one in existence who was entitled to say that it was not, as in fact it was, a perfectly valid mortgage.

Judgment.

OSLER,
J.A.

For the same reasons the sale is also an answer to any contention that the mortgage is void under the Assignments and Preferences Act and the amending Act 54 Vic. ch. 20 (O.): *Stuart v. Tremain*, 3 O. R. 190; *Harvey v. McNaughton*, 10 A. R. 616. The sale was a real sale under a mortgage valid *inter partes*, voidable only at the election of creditors in a position to sue while the goods were held under that title, but to whom the Act has given no relief as against a purchaser to whom the goods have been alienated for value.

In my opinion the appeal must be allowed.

MACLENNAN, J. A. :—

I think that the appeal should be allowed. It is unnecessary to decide whether the plaintiffs could properly commence and maintain their action before their debt became due. *Macdonald v. McCall*, in this Court, 12 A. R. 593, and in the Supreme Court of Canada, 13 S. C. R. 247, makes it at least doubtful whether that might not be done. Whenever it becomes necessary to decide the point it will have to be considered how far it has been passed upon in that case.

The real question in the appeal is whether the sale to Scott was good, and I think it was. It was made not only by the mortgagees but by the mortgagor. The latter was as much bound by it, and could as little question it as the former. The mortgagor could have sold the goods to Scott if there had been no mortgage in the case. He might have told Scott that he was embarrassed and that he could not pay his debts in full, and yet he could have made a valid sale to him for a fair and honest price. The fairness and honesty of the price on the sale to Scott is not questioned, and the sale was made and completed before this action was brought. That being so, there were when the action was

Judgment. brought, no goods and chattels in existence capable of being
MACLENNAN, reached by the action. They had become the goods and
J. A. chattels of Scott, honestly bought and paid for, and beyond
the plaintiffs' reach, and there were no goods or chattels
either of the debtor or of the mortgagees.

It was admitted that the registration of the mortgage was defective, and that if before the sale to Scott an execution had come in, the mortgage would have been void. But until an execution did come in, or until a subsequent sale or mortgage was made by the debtor, or something else occurred to avoid it, McMahon & Co.'s mortgage was perfectly good and they could seize under it and sell the goods, and recover the proceeds.

What the appellants say is that the Act of 1892, 55 Vic. ch. 26, sec. 2 (O.), has made the mortgage void against the plaintiffs, because for some time before the sale to Scott the plaintiffs were simple contract creditors. I think there has been some inadvertence in the framing of this enactment. It says that in the application of the Act R. S. O. ch. 125, relating to sales and mortgages of personal property, the words void as against creditors "shall extend to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors." Now, "simple contract creditors" means creditors other than by bond, covenant or other specialty such as a judgment of a court of record, and it can hardly have been intended to give a remedy to the holder of a note, or to a creditor for the price of goods sold, which was not available to a creditor by a bond or covenant. But, however that may be, the statute has not said that it extends to simple contract creditors *simpliciter*, but to such creditors suing on behalf of themselves and other creditors. Therefore, until suit brought in the way described, the creditor is not qualified for the privilege intended by the statute. He is a creditor, but not a creditor suing on behalf of himself and other creditors, and may never be. Until such a suit is brought the mortgage is good, and the mortgagee and the debtor between them may sell and dispose of the goods and make

a good title. I think, therefore, that the sale to Scott having been made before the plaintiffs brought this action the goods could not be followed, and the mortgage having been for an honest and valid debt, the proceeds of the sale cannot be taken away from the mortgagees.

Judgment.
MACLENNAN,
 J.A.

The appeal should therefore be allowed, and the action should be dismissed.

HAGARTY, C. J. O.:—

I agree.

Appeal allowed with costs.

TAYLOR V. BRANDON MANUFACTURING COMPANY.

Patent of Invention—Novelty—Specification—Ambiguity.

There is no inventive merit in making in one piece the cap-bar and protector of a washing machine, the cap-bar and protector having been previously made in two separate pieces.

A specification providing merely that such a protector is to be arranged “at an angle” is void for uncertainty.

Judgment of the Chancery Division affirmed.

THIS was an appeal by the plaintiff from the judgment of the Chancery Division, reversing that of STREET, J., at the trial, in his favour, in an action to restrain the infringement of a patent for a washboard. Statement.

The washboard in question was thus described in the specifications and drawings:—

“The invention relates to improvements in washboards, and consists in a certain novel construction and combination of devices fully described hereinafter in connection with the accompanying drawings, and specifically set forth in the claims.



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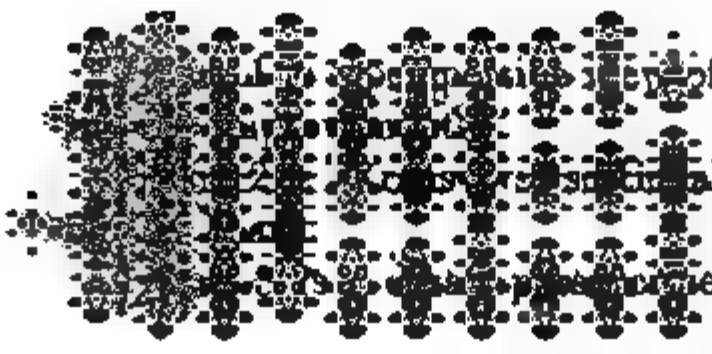


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of a washboard embody-
view of the upper end
view of the combined

cap-bar and protector, as seen before it is applied to the Statement board.

Referring by letter to the drawings, A designates a washboard of the ordinary or any preferred construction having the side bars B B, which are bevelled at their upper ends, and the head board C, which is secured to the rear edges of the side bars. The upper ends of the side bars are bevelled upward toward their front edges, and the upper edge of the head board projects above the upper ends of the side bars at their rear edges, as will be readily seen in figure 2.

D represents the combined cap-bar and protector, which as shewn in figure 3 of the drawings, are shaped exactly alike and are arranged at an obtuse angle to each other. The cap-bar E, as seen in figure 1, is secured by nails or equivalent securing devices to the upper bevelled ends of the side bars, and the rear edge of the cap-bar against the upwardly projecting edge of head board, and forms a tight joint therewith. The herein described construction, whereby the rear edge of the cap-bar is overlapped by the upper edge of the head board, prevents water and suds from working between the same and soiling the clothes of the operator.

The protector F is formed integral at its rear edge with the front edge of the cap-bar, and projects forward horizontally beyond the front edges of the side bars. In washing, the suds and water are dashed up against the cap-bar and are prevented from splashing out by the overhanging protector, which acts as a deflector and throws the water and suds back into the tub or vessel, in which the board stands.

As above described, the combined cap-bar and protector consists of two integral bars EF, exactly alike in shape, either of which may be attached to the upper ends of the side bars, thereby simplifying and cheapening the manufacture of the board.

Subsequent to the application of the combined protector and cap-bar to the side bars, the front edge of the

Statement. protector may be rounded at the corners or dressed in any preferred manner as shewn in figure 1 of the drawings, or it may be left as shewn in figure 3.

I am aware that it is not broadly new to provide washboards with protectors which are attached to the cap-bars, and, therefore, I do not desire to claim this construction, and I am aware also that it is not new to provide protectors which may be adjusted by mechanical means so as to protect either side of the washboard, and therefore do not claim this construction.

I wish to limit myself to the construction of the combined cap-bar and protector, composed of two similar integral bars arranged at an angle to each other. The bevelled construction of the side bars of the washboard has peculiar advantages in securing the proper set of the protector, so as not to interfere with the operator while washing.

Having thus described the invention, I claim :

The combination with the washboard provided with side bars BB, having their upper ends bevelled, and the head board C of the combined-bar and protector D comprising the integral similar bars EF, arranged at an angle to each other, substantially as and for the purpose specified."

At the trial it was clearly shewn that the plaintiff's washboard was most useful, and had almost superseded the kinds before in use, having, as a witness expressed it, "taken the market." The Divisional Court held, however, that there was no inventive merit in the improvement.

The plaintiff's appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 8th and 9th of March, 1894.

Osler, Q. C., for the appellant. The learned trial Judge has found as facts, that the subject matter of the patent in question constitutes a patentable invention; that the invention is novel; that it is useful, and that the respon-

dents have infringed, and these findings of fact are abundantly supported by the evidence. The judgment appealed from treats the patent in question not as one for a combination, but as one for the various elements composing the combination, which is contrary to the fact. The evidence clearly establishes that there were practical difficulties to be overcome in the application of protectors to washboards, and instead of the mode of overcoming such difficulties being obvious to persons of ordinary skill and intelligence, it appears that for a long series of years different ineffectual attempts had been made to attain the desired end. It required skill and ingenuity to overcome the difficulties. The device to be practically successful must be strong, simple and inexpensive. These difficulties have been overcome by the ingenious combination of elements which constitute the invention covered by the plaintiff's patent, and the invention is clearly meritorious. See *Gosnell v. Bishop*, 5 Pat. Cas. 151; *Ehrlich v. Ihlee*, 5 Pat. Cas. 437; *Daw v. Eley*, L. R. 3 Eq. 496; *Murray v. Clayton*, L. R. 7 Ch. at p. 581; Higgins, 2nd ed., p. 226.

Shepley, Q. C., for the respondents. The so-called improvement which forms the subject of the appellants' patent, is void for want of invention. It is in no sense an invention at all, but is a mere application of an old device. The interposition of a concave surface to intercept matter in motion, is as old as motion itself, and here there is merely a very old and well known application of this old idea. The first man who, when driving in his waggon or sleigh, found himself troubled by the propulsion of snow, water, and mud, from the heels of his horse was confronted with precisely the same problem, which, upon the plaintiff's theory, confronted the splashed washerwoman, and solved it in precisely the same way, viz., by extending and deflecting the dashboard of his vehicle to intercept the snow, water, and mud, so propelled. Any mechanic to whom the difficulty had been explained, would have at once suggested the very device which this patent adopts. See *Yates v. Great Western R. W. Co.*, 2 A. R.

Argument. 226; *Harwood v. Great Northern R. W. Co.*, 11 H. L. C. 654; *Losh v. Hague*, 1 Webster 200; *Conover v. Roach*, 4 Fisher 12; *Sargent v. Burgess*, 129 U. S. 19; Frost's Law of Patents, p. 62; Higgins, 2nd ed., p. 522; *Jackson v. Needle*, 2 Pat. Cas. 191; *Longbottom v. Shaw*, 5 Pat. Cas. 497; 6 Pat. Cas. 143; 8 Pat. Cas. 333; *Sharp v. Brauer*, 3 Pat. Cas. 193; *Morgan v. Windover*, 5 Pat. Cas. 295; 7 Pat. Cas. 131; *Slazenger v. Feltham*, 6 Pat. Cas. 232; *Blakey v. Latham*, 6 Pat. Cas. 184.

Osler, Q. C., in reply.

June 30th, 1894. The judgment of the Court was delivered by

MACLENNAN, J. A.:—

The claim 'in this patent is a combination of two elements. The first element is a "washboard provided with side bars, having their upper ends bevelled, and a head-board." It would seem as if what is called a head-board would be with more propriety called a back-board, but at all events what is clearly meant is a board fastened to the backs of the side bars, and forming the bottom of the wooden box, above the metallic part of the washboard, sometimes called the soap box. The other part of the combination is a "combined cap-bar and protector, comprising two integral similar bars arranged at an angle to each other." The claim refers to drawings in a manner which clearly shews the parts thus named and their arrangement in the constructed machine, and the usual words are added, "substantially as and for the purpose specified."

The inventor then says he is aware that it is not new to provide washboards with protectors which are attached to the cap-bars, and does not claim that construction. He also says he is aware that it is not new to provide protectors which may be adjusted by mechanical means so as to protect either side of the washboard, and therefore does not claim that construction.

It is necessary, therefore, to consider carefully the claim in connection with these disclaimers, in order to see precisely what it is that is really claimed, and for which protection is sought.

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MACLENNAN,
J.A.

But first it may be of use to observe that the first element of the combination has nothing whatever that is new in it; that is, "the washboard provided with side bars having their upper ends bevelled and the board C." The old Globe machine, and the Planet machine, which is said to be the same as the Globe, which were in use for years before the plaintiff's invention, have these parts constructed and arranged in precisely the same manner as in the plaintiff's machine. The plaintiff, therefore, can claim nothing which is contained in the first part of the combination. Then also a cap-bar fastened upon the bevelled upper ends of the side bars is also found in the Globe machine, and is, therefore, an old feature.

I now come to the first disclaimer. He says it is not new to provide washboards with protectors which are attached to the cap-bars; and he does not claim that construction. Therefore, if I understand him aright, if one were to take the old Globe machine, and to attach to its cap-bar a protector, that would be unobjectionable, that would be nothing new, and it is obvious that if one were doing that he would attach it at such an angle as would be most effective. The workman would consider the position in which the board is usually placed in the tub when in use, and he would adopt such an angle as would deflect the splash of suds in the best manner. All that, according to the disclaimer, would be allowable; and when done it would obviously be identical with the plaintiff's machine, with only one difference, namely, that the plaintiff, instead of attaching the protector to the cap-bar, makes the two in one piece. To my mind, it is either that or nothing. He describes his contrivance thus: "The combined cap-bar and protector D, comprising the integral similar bars EF, arranged at an angle to each other." I think that means, though to my apprehension it is rather vague, to express

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that the cap-bar and the protector bar are to be constructed of one piece of wood, but that they are to be arranged at an angle to each other. In the descriptive part of the specification, he says: "D represents the combined cap and protector, which, as shewn in figure 3 of the drawings, are shaped exactly alike, and are arranged at an obtuse angle to each other;" and in another paragraph: "The protector F is formed integral at its rear edge with the front edge of the cap-bar, and projects forward horizontally beyond the front edges of the side bars."

Mr. Justice Robertson thinks that after the first disclaimer, all that is left of the claim, is "the particular angle at which the cap-bar and protector are joined together." The learned Chancellor on the other hand thinks that what the plaintiff has done and embodied in his patent, is the embodiment of the cap-bar and protector bar in one piece.

In this particular I agree with the conclusion of the Chancellor; and the question then comes to this, whether if a cap-bar and protector, such as the plaintiff makes in every respect, but framed in two separate pieces, was not new, and might be made and used by the public, there is such inventive merit in making the two parts in one piece instead of two as to entitle the maker to a patent. On this point I agree entirely with the learned Judges of the Divisional Court, and as expressed by the Chancellor, that any workman seeing such a piece fastened to the cap, could, without the exercise of any inventive faculty, suggest that the whole might be more strongly and conveniently constructed in one piece.

If we look at the other disclaimer it seems to lead to the same conclusion. In that he says it is not new to provide protectors which may be adjusted by mechanical means so as to protect either side of the washboard. That would seem to allow of the construction of a cap-bar with a protector on each side instead of on one side, and all three made in one piece. If so, it is impossible to see any patentable quality in the plaintiff's contrivance.

Besides these objections, which I think are fatal to the patent, I think it ought probably to be held void for uncertainty in the specification. The claim says that the cap-bar and protector are to be arranged at an angle simply. That, of course, includes any and every angle. If the claim is good, then a construction at any angle whatever from one degree to 180° would be an infringement. The descriptive part of the specification says the arrangement is to be at an obtuse angle ; and in another place, that the protector projects forward horizontally beyond the front edges of the side bars. The drawings and the machine produced shew an obtuse angle, but neither of them indicates a horizontal projection. If, therefore, a workman were constructing a machine from the plaintiff's specifications, there is nothing to guide him in determining what bevel to give the top of the side bars, or what degree of obtuseness to give to the angle between the cap-bar and the protector. It seems to me that a workman who could find out for himself the most advantageous bevel to use for the side bars, and the most advantageous angle at which to arrange the cap-bar and protector, would have no difficulty in constructing the latter two parts in one piece.

Judgment.

MACLENNAN,
J.A.

On the argument, I had a strong impression in favour of the merit of the invention and the validity of the patent, by reason of the fact that the plaintiff's machine had driven the old ones out of the market in a very short time. But it appears that the only old machine that was in general use in this country was the old Globe machine, which has no protector at all ; and the evidence gives us no comparison of merit at all between the plaintiff's machine and the earlier machines constructed with protectors.

I think that the judgment is right, and that the appeal should be dismissed.

Appeal dismissed with costs.

COUNTY OF LINCOLN V. CITY OF ST. CATHARINES.

*Municipal Corporations—County Road—Joint Stock Road Company Act—
C. S. U. C. ch. 49—Queenston and Grimsby Road.*

Held, that the legislation and proceedings thereunder, set out in the judgment of the Court, relating to the Queenston and Grimsby road and the city of St. Catharines, did not make the city liable to pay to the county of Lincoln any part of the expenditure of the latter in connection with that road.

Effect of the withdrawal of city from jurisdiction of county upon roads owned by the county passing through the city, considered.

Regina v. Louth, 13 C. P. 615; *Regina v. Brown and Street*, *ib.* 356; *St. Catharines Road Co. v. Gardner*, 21 C. P. 190, specially referred to.

Unless specially retained by statute, the withdrawal of a city from the jurisdiction of the county terminates all liability of the former to taxation for county purposes.

An agreement by a city withdrawn from the jurisdiction of the county to contribute towards the maintenance and repairs of a county road is *ultra vires* the city corporation.

Judgment of the Common Pleas Division, affirmed.

Statement.

THIS was an appeal by the plaintiffs from the judgment of the Common Pleas Division, and was argued before HAGARTY, C.J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 17th of May, 1894.

The case turned upon the effect of special legislation, and the Acts in question are fully referred to in the judgment.

S. H. Blake, Q. C., and *J. C. Rykert*, for the appellants.

Aylesworth, Q. C., and *F. W. Macdonald*, for the defendants.

June 30th, 1894. The judgment of the Court was delivered by

OSLER, J. A. :—

The question to be decided is, whether the corporation of the city of St. Catharines is liable to pay to the corporation of the county of Lincoln any share or proportion of the liability or expenditure of the latter in connection with or on account of the maintenance and repair of a road called the Queenston and Grimsby road. This road

was originally constructed in whole or in part, some years before 1850, by the Provincial government, by whom it was transferred to the then united counties of Lincoln, Welland and Haldimand. It passed through the townships of Niagara and Grantham, the town of St. Catharines and the townships of Louth, Clinton, and Grimsby, these being municipalities which then formed part of the county of Lincoln. For the purpose of the case, we may commence at that point in the history of the road when it was purchased from the county of Lincoln (then separated from the other counties), by a joint stock road company, created under the provisions of the Joint Stock Road Companies Act, 12 Vic. ch. 84, in the year 1853, for the purpose of purchasing and maintaining it. The stockholders of this company consisted of the town of St. Catharines and the township municipalities already mentioned.

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This company worked and managed the road until the year 1859, when they petitioned the county council to assume and take it over from the 1st of May, 1860. The council on the 25th October, 1859, passed a by-law in compliance with the petition "to assume and take over the Queenston and Grimsby macadamized road on and after the 1st of May next as a county road;" and further enacted that on and after that date the tolls should be removed from the road, and all persons allowed to pass and re-pass over it without charge. On the 23rd August, 1860, by indenture made between the company of the first part, and the county of the second part, the company, in consideration of the sum of £100, granted to the county "all and singular the Queenston and Grimsby road being the now travelled road from the village of Queenston through the town of St. Catharines, and the villages of Jordan, Beamsville, and Grimsby, to the western boundary line of the county of Lincoln, together with all and singular the tolls, buildings, easements, profits, privileges, and emoluments and appurtenances whatever, to the said road belonging, etc. To hold to the party of the second part,

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their successors and assigns, to the use of the said parties of the second part, their successors and assigns forever."

In the month of January, 1862, the county council, treating the road as a road which the council had assumed by by-law as a county road under section 339 of the Municipal Townships Act, C. S. U. C. ch. 54, passed a by-law under section 342, sub-section 8, to compel the municipalities through which the road passed, to maintain the portions of the road which passed through such municipalities. It is observable that nothing was said as to that part of the road which passed through the town of St. Catharines, a fact which adds weight to the contention—which there are many other reasons for thinking well founded—that the road never was legally established through the town. I shall not, however, further refer to this, though it is pressed in the reasons against the appeal, as my judgment does not turn upon it. That the council had taken an erroneous view of the character in which they held the road, was very shortly afterwards established by *Regina v. Louth*, 13 C. P. 615, in which that township was indicted for allowing that part of it which passed through the township to be out of repair. The Crown relied upon the by-law as casting the duty to repair upon the township, but it was decided that the road was still held by the county "not as a road belonging to the county, as a county road within the meaning of the statute, but as one acquired by the county as the assignees of the Queenston and Grimsby road company, in whose right the corporation of the county still holds it."

After referring to the several relevant sections of the General Joint Stock Road Company Act, C. S. U. C. ch. 49, relating to the acquirement by the county of a road constructed under the Act, and especially to section 84, which enacts that the company or municipality to which it belongs, shall keep it in repair, the Court adds: "We find no power given to the county council to divest themselves of the character in which they took this road so as to make it a county road within the meaning of the stat-

utes first referred to, and to throw the duty of repairing it on the corporation of the township of Louth." In the case of *Regina v. Brown and Street*, 13 C. P. 356, an application for a mandamus against the defendants as purchasers of another joint stock company road, the St. Catharines, Thorold, and Suspension branch road company, to keep in repair that portion of the road which passed through the village of Thorold, it was held that roads of joint stock companies were not public roads or highways within the meaning of the Municipal Institutions Act, and that that part of the road which passed through the village was not vested in the village corporation, but belonged to the defendants, the successors of the original joint stock company, who were, therefore, bound to keep it in repair. This case was affirmed by the Court of Error and Appeal in a subsequent case of *St. Catharines, etc., Road Co. v. Gardner*, 21 C. P. 190, where it was held as to that part of the road which ran through the town of Clifton, that the company was entitled to levy tolls thereon within the town limits, notwithstanding the incorporation of Clifton as a town after the construction of the road.

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 OSLEN,
J. A.

The position, therefore, of these plaintiffs with regard to the road now in question, after the decision in *Regina v. Louth*, was, that they owned it, not as an ordinary municipal road, but as any other asset or piece of county property, and that as such owners they were bound to keep it in repair. The funds necessary for that purpose were to be raised and levied by assessment upon the various municipalities within the county, including the defendants, then a town not separated from the county, in the same manner as taxes for other county purposes were levied. Before long, however, it was seen that this bore very hardly upon those local municipalities in the county through which the road did not pass viz. the town of Niagara, and the townships of Caistor and Chippewagon, and on the petition of the county an Act was passed by the Legislature on the 31st May, 1853, 25 V. c. 12, "to relieve" these municipalities, and it was accordingly enacted

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that for any liability or expenditure connected with the assumption by the corporation of the county of Lincoln of the Queenston and Grimsby road as a county work, the said corporation shall assess or tax the townships of Niagara, Grantham, Louth, Clinton, and Grimsby, and the town of St. Catharines "only," and shall not for any such purpose impose any assessment or tax upon either the town of Niagara or the townships of Caister or Gainsborough in the said county, nor shall any such liability or expenditure be in any way chargeable upon or borne by the said town and townships last mentioned.

The fact that this Act was evidently petitioned for and passed upon the mistaken assumption that the road had been assumed by the county as an ordinary municipal road, has no bearing, that I can see, upon the proper disposition of the case.

It is upon this Act that the right of the county to recover in this action is mainly rested, though they also rely upon another ground which I shall afterwards mention. The contention of the defendants is, that as in the year 1876, by force of 39 Vic. ch. 46 (O.), and proceedings duly taken thereunder, they were incorporated as a city and entirely withdrawn from the jurisdiction of the county, the right of the latter to assess and tax them for the maintenance of and expenditure upon the road no longer exists. This contention is, in my opinion, unanswerable. The object of the Act 26 Vic. ch. 13, was not to impose a liability upon any minor municipality in the county to the county tax for the maintenance of the road. That liability already existed in the nature of things from the relation of those municipalities to the county. The Act was aimed, as the preamble expresses it, at relieving the three municipalities which were thereby exempted from a liability to taxation for a purpose they were not interested in. It left the right and power of the county to tax the others as before. But when St. Catharines became a city, withdrawn from the jurisdiction of the county, that right and power came to an end. The county

of Lincoln could no more impose a tax upon the city of St. Catharines than upon any other municipality which was independent of the county or which belonged to another county, as for example, had the township of Grimsby been taken from Lincoln and annexed to an adjoining county. I arrive at this conclusion quite apart from the question whether that part of the road which passes through the city of St. Catharines is still the property of the county. If it be, and if the county as owner is still liable to repair it, the assessment for repairs to county property must be made upon the county and not upon a municipality which forms no part of the county, and over which the county has no jurisdiction. I am not, however, to be understood as suggesting that this portion of the road does belong to the county, or that the portion which traverses the city is a part of the road which belonged to the old company and was acquired by the county from them. It appears for many years before the incorporation of the city to have been maintained and kept in repair by the town, and I doubt if the cases above cited from 13 C. P. 356, and 21 C. P. 190, go so far as to prevent, in the case of a road owned by the county, the application of C. S. U. C. ch. 54, sec. 26, sub-sec. 6, R. S. O. ch. 184, sec. 25, sub-sec. 6, which enacts that after the withdrawal of a town from the county all property theretofore owned by the county, except roads and bridges within the town, shall remain the property of the county.

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J.A.

The plaintiffs further contend that the proceedings, or some of them, to which the county and city were parties subsequent to their separation, operate as an estoppel upon the latter and prevent them from denying their liability to pay a proportion of the cost of the repair and maintenance of the road in the county.

When the city withdrew from the county under the authority of section 13 of their Act of incorporation, an arbitration took place as provided by section 25 of the

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Municipal Act to settle the amount to be paid by the city to the county for expenses connected with the administration of justice, etc.

The award was made on the 30th September, 1876, and the amount thereby fixed was to be paid during the five years from the 1st of May, 1876. The arbitrators awarded in respect of the road in question, that the city should pay the county in the proportion of \$1 by the city to \$3.19 by the county on the sum which the county was by law compelled to expend, and which the county actually expended annually in repairing the road, etc. This was to continue for five years from the 1st May, 1876.

The city appear to have submitted to this award without objection, though I have been unable to find anything in the terms of the reference or the provisions of the statute which justified it. The parties then and afterwards proceeded on the assumption that there was a joint ownership of the road by the city and county, which seems to me to have been a total misapprehension of the position.

At the expiration of the five years from the 1st May, 1876, a further arbitration was held pursuant to section 25, sub-section 57, of the Municipal Act, and the arbitrators again undertook to award respecting the road, but on this occasion by directing that all that portion of the road which lay within the city should be and remain the exclusive property of the city, and all that portion which lay within the county should be and remain the exclusive property of the county, and the road being unproductive of any revenue, nothing was awarded to be paid by either party to the other in respect thereof. This clause of the award was afterwards (20th December, 1881) struck out on a motion by the county to set aside the award, and the county continuing to insist upon the liability of the city to contribute a proportion of the expense of maintaining the road, an agreement purporting to be made between the county of the first part, and the city of the second part, was signed by the warden on behalf of the county, and the mayor on behalf of the city, referring in terms the

questions both of the city's liability to contribute under the Act 26 Vic. ch. 13, and the amount to be paid in respect thereof for the period of five years from the expiration of the award of 1876. The learned arbitrator found that the city was liable to contribute, and fixed the sum to be paid annually to the county for five years from the 1st May, 1881. Neither the agreement nor the award were ever authorized or adopted by any by-law of the city, but on the 7th June, 1886, in order to carry into effect an agreement for that purpose between the city and the county, the city passed a by-law enacting that the award of the arbitrators dated 30th July, 1881, fixing the amount payable by either municipality for the five years, ending the 1st May, 1886, and the award of E. J. Senkler, Esq., dated 21st March, 1883, of and concerning the amount payable by the said municipalities respectively for the said five years in respect of the Queenston and Grimsby macadamized road "be continued for a further period of five years in the same manner as if a new award had been made between the parties."

Judgment

 OSLER,
J.A.

At the expiration of this period, the city finally determined to resist all further claim on the part of the county with respect to the road. The county rely on the terms of the agreement of reference to Judge Senkler as now estopping the city from disputing its liability. The agreement is not very cautiously framed, but I think it admits of being fairly construed as a reference only of liability and amount for the period for which the award was to be made, and not as authorizing the arbitrators to determine the former for all time to come. But a stronger answer to the contention of the county is, that in the absence of a by-law at all events, the mayor of the city had no authority to commit and bind the corporation to the terms of the agreement, and to fix upon the latter for all time a liability to contribute to the expense of a road outside its limits, which by law it was not bound to maintain. Such an agreement indeed would be *ultra vires* the corporation, but even if *intra vires*, the mayor in the absence of a by-

Statement. under the hand " of the town clerk, as required by section 120 of the Assessment Act, R. S. O. ch. 193, and that it was therefore not a roll under which the collector could lawfully distrain for the taxes; and that without such distress he could not collect more than he had actually received and paid over.

It was admitted that he had received and paid over very nearly \$24,000 out of a total of about \$30,000.

It was not shewn or suggested that the roll was incorrect or defective in any particular, except the want of the clerk's certificate.

The case was tried at Belleville on the 27th of September, 1893, before ARMOUR, C. J., who, on the 1st of November, 1893, gave the following judgment in the plaintiffs' favour:

ARMOUR, C. J. :—

The plaintiffs are, in my opinion, entitled to recover. The sole and only contention on the part of the defendants was that the collector's roll, delivered to the defendant Dyer, was invalid by reason only of its not having been certified or signed by the clerk of the plaintiff corporation, as required by R. S. O. ch. 193, sec. 120. It was neither contended nor pretended that the collector's roll had not been made out as required by section 119, nor that there was any invalidity in it, and I find that it was so made out, and was a valid collector's roll, unless the absence of the certificate or signature of the clerk shall be held to be an invalidity, and that it was duly delivered by the clerk to the defendant Dyer, the collector.

The defendants contended that this roll was an illegal roll by reason of the absence of such certificate or signature, and did not, without such certificate or signature, authorize or justify the collection of the taxes therein mentioned, by distress, and that the collector was consequently absolved from the collection thereof, and from liability under his bond sued upon. In *Lewis v. Brady*, 17

O. R. 377, this Court held that the provision of section 120, that the roll should be delivered to the collector on or before the 1st day of October, was directory merely, and I am of the opinion that the provision of this section that the roll shall be certified under the hand of the clerk is also merely directory, and that the roll delivered to the collector without the certificate or signature of the clerk was a sufficient authority to the collector, and would have justified him in distraining for the taxes therein mentioned.

Judgment.

ARMOUR,
C.J.

The cases of *Morgan v. Parry*, 17 C. B. 334; *LeFeuvre v. Miller*, 8 E. & B. 321; and *Caldow v. Pixell*, 2 C. P. D. 562, are strong authorities in support of this view. I also refer to Maxwell's Interpretation of Statutes, 2nd ed., at p. 457; Wilberforce's Statute Law, at p. 207, and Hardcastle's Construction of Statutory Law, 1st ed., at p. 121.

The damages to which the plaintiffs are entitled are the whole amount of the taxes mentioned in the roll, less the amount paid over by the defendant Dyer to the plaintiffs, in respect of such taxes. And I refer the ascertainment of such damages to the local Registrar of this Court at Belleville, and the judgment will be for the amount so found, with full costs of suit, including the costs of such reference.

The defendant Dyer was not entitled to his salary, as collector, until he had performed his duty, and the local Registrar will make no allowance to him in respect of his salary as collector.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 9th of May, 1894.

A. A. Abbott, and T. A. O'Rourke, for the appellants. The cases relied on by the Chief Justice do not support his decision. *LeFeuvre v. Miller*, 8 E. & B. 321, dealt with a mere preliminary direction as to publication in connection with the collection of poor rates, and *Caldow v. Pixell*, 2 C. P. D. 562, holds that a provision for the signature of lists of voters was merely directory, while the passages

Judgment.

HAGARTY,
C.J.O.

to the treasurer of the Province, or other special purpose, etc., etc., shall be similarly calculated in the assessment as finally revised, and shall be entered in the collector's roll in separate columns designating the purpose. "And the clerk shall deliver the roll, certified under his hand, to the collector on or before the 1st of October, or such other day as may be prescribed by a by-law of the local municipality."

Section 121. The clerk shall also make out a non-resident roll, in which he shall enter the lands of non-resident owners, whose names have not been set down in the assessor's roll, with values and rates, etc., in the same manner as prescribed in the collector's roll, and shall transmit such roll certified under his hand to the county treasurer or treasurer of city or town.

Section 122. "The collector upon receiving his collection roll shall proceed to collect the taxes therein mentioned."

Sections 12 and 13 authorize councils to appoint assessors and collectors; to assign their duties, and prescribe regulations for governing them in performing them.

Section 50. The assessor is to return his roll to the clerk with an affidavit of verification.

Section 64 and its numerous sub-sections provide for the Court of Revision, and for the adjustment of all errors in the assessment, etc., and the final revision of the assessment.

Sec. 65. The roll as finally settled and certified by the clerk, etc., shall bind all parties.

Section 66. A copy of the assessment roll, or portion thereof, written or printed without erasure, under the seal of the corporation, and certified by the clerk to a true copy, shall be received in Courts of Justice, etc.

Section 69 prescribes the course of making alteration in the Court of Revision, and the initialing of alterations by the clerk.

Section 75. After the final revision of the assessment roll the clerk shall transmit to the county clerk a certified copy thereof.

Section 140. The county treasurer shall furnish the clerk with list of arrears of taxes.

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Section 143, sub-section 3. The clerk is to add the arrears to the collector's roll to be collected.

HAGARTY,
C.J.O.

Section 124 empowers the collector after certain demands and defaults to levy the taxes with costs by distress of goods and chattels.

This power, is of course, wholly derivable by the collector from the roll alleged to be delivered to him.

Section 131 gives a remedy by action where taxes cannot be recovered in any special manner prescribed by the Act, as a debt due, and provides that a production of a copy or so much of the collector's roll as relates to the taxes payable, purporting to be certified as a true copy by the clerk, shall be *prima facie* evidence of the debt.

Section 223 requires the collector to give a bond for the faithful performance of his duties.

Section 225 imposes penalties on clerks, etc., neglecting to perform any duty required by the Act.

Section 231 gives a summary remedy where a collector neglects to pay the sums contained in his roll, or duly account for the same as uncollected, and provides that the treasurer may give a warrant under his hand and seal to the sheriff to levy on the collector and his sureties, and by

Section 234 a summary application may be made to a Judge of the High Court against the sheriff for neglecting to act, etc.

The directions of the statute seem very plain and clear. The clerk, after making out the roll, "shall deliver it certified under his hand." The Interpretation Act declares that "may" is permissive and "shall" imperative.

We have to consider in applying this interpretation the general purpose and direction of an enactment.

Under the Municipal and Assessment Acts a multitude of duties are imposed on executive officers in carrying out a complicated system of public duties. One department has to refer to another, which has to act on the information communicated to it, and it seems to be all important to require

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C.J.O.

all possible and reasonable compliance with statutable directions as to the verification of such information and the due authentication of documents which form the channel of communication, and warrant the action directed to be taken by the department or officer receiving the same.

The collector's roll spoken of in the statute is directed to be certified by the clerk under his hand.

The assessment roll as finally revised and lodged with the clerk, with all its corrections made as directed by him, may be looked upon as an official document or record in his office. A mere transcript of such roll could not be a roll for the collector.

Apart from the assessment roll the clerk has to add a number of charges as to rates, special and general, county rates, debenture rates, arrears, etc., not found in the assessment roll. The collector's roll has to contain all these, and the clerk has to gather them from various documents and entries under the statute.

I am at a loss to understand how the law can assume that in the total absence of any evidence of the amount or the accuracy of added items, the handing of a roll of paper, not even shewn to be in the clerk's handwriting, can be held to be a compliance with the statute, or be held to become a "collector's roll" without the faintest verification by signature, not to say, certificate.

The learned Chief Justice says: "It was neither contended nor pretended that the collector's roll had not been made out as required by section 119, nor that there was any invalidity in it, and I find that it was so made out, and was a valid collector's roll, unless the absence of the certificate or signature of the clerk shall be held to be an invalidity, and that it was duly delivered by the clerk to the defendant Dyer, the collector."

But this hardly meets the difficulty. We can hardly see what counsel could have done beyond objecting that the document was not warranted by the statute to be treated as valid.

Nor do I think that it was the duty of the defendants' counsel to have urged that so far as it went it varied from the assessment roll. Its agreement with the latter would leave the objection unanswered.

Judgment.

HAGARTY,
C.J.O.

What evidence was there in any way to support the various special entries to be made by the clerk from various sources other than the assessment roll ?

Prima facie the document given to the collector had no verification whatever.

The plaintiffs, who contend that it was a valid roll, ought, I think, in the absence of the statutable verification, to be the parties on whom the burden of supporting its validity was cast by proving its accuracy, as its statutable parent the clerk would not vouch for its legitimacy.

If this contention of the plaintiffs be sound, then the mere delivery of a paper to the collector unattested and unvouched was good warrant for enforcement of the taxes by distress.

It would be singular if there could be the conferring of a power of distress of goods and chattels by the delivery of this wholly unattested document to the collector.

If the latter had distrained and the ratepayer had replevied, the justification would be under the collector's roll. On a traverse of no such roll and issue thereon, of course the point now before us would arise.

I cannot think the Court could hold that the proof as here given would suffice.

My strong impression is that its verification in some shape or other by the officer handing it to another for his action thereon, would be essential to its legal efficacy under the statute from which its whole legal existence depends. It is wholly a creation of the statute which must be substantially followed to warrant an invasion of the rights of property.

Our Courts have gone as far, I think, as was possibly safe, in holding the signature of the clerk at the foot of the roll to be sufficient without formal certificate. This was in *Whitby v. Harrison*, 18 U. C. R. 603, an action

Judgment.

HAGARTY,
C.J.O.

on a bond against the collector for not paying over moneys collected by him. Sir J. Robinson says: "We think the signature of the clerk sufficiently verified the roll to enable the collector to receive the money, for his signature at the end sufficiently authenticated the roll as that on which he was to make his collections." In *Whitby v. Flint*, 9 C. P. 449, Draper, C. J., says (p. 453): "The authority to collect the rates does not simply depend on the appointment, but also on the receipt of such a collector's roll as the statute directs shall be prepared and delivered to him; a roll which points out the sums to be collected, and from whom; and which, with the statute, operates as a warrant to distrain. * * It seems (p. 457) that all that was intended or required was an authentication of the roll by the officer whose duty it was to prepare it, of its being what it purports to be, namely, the collector's roll for the township, prepared by the clerk, and for this purpose I think the signature of the clerk is enough."

It will be very hard to convince me that either of those distinguished Judges—familiar as they were with our municipal system and law—would have upheld the roll in the cases before them as sufficient without even such signature.

I am ready to follow these cases, but not to take the step now proposed of sweeping away all need of authentication of a document like that before us.

We must, I think, assume that the Legislature wisely and purposely provided such a guarantee of truthfulness and accuracy as is here required. The powers granted in these proceedings for the collection of taxes are, perhaps necessarily, very stringent and peremptory, and the consequent proceedings are of a formidable character.

Penalties are provided on such offenders as clerks for non-performance of any statutable duty, and very summary remedies on defaulting collectors, sheriffs, etc., etc.

I think the words of Martin, B., in *Bowman v. Blyth*, 7 E. & B. 48, are worth citing: "Though I do not question that, in construing Acts, language seemingly positive may

sometimes be read as directory, yet such a construction is not to be lightly adopted; and never when, as in this case, it would really be to make a new law instead of that made by the Legislature."

Judgment.
HAGARTY,
C.J.O.

I think that we must allow the appeal.

MACLENNAN, J. A. :—

Two questions were argued before us; first, whether the statute was merely directory and not obligatory; and, secondly, whether a large part of the taxes being still according to the evidence collectible, the defendant and his sureties could be held liable for the whole.

Upon the first question I have come to the conclusion that the judgment of the learned Chief Justice is wrong, and that the direction of the statute is obligatory.

Prima facie it is obligatory; it is something which the Legislature has enjoined, a duty which has been cast upon the clerk, and it rests with those who affirm that it is only directory to assign good reasons for holding it to be so.

It is quite a different question whether the time named in the statute for the delivery of the roll is obligatory. The intention of the statute is that taxes are to be collected, and the mode of collection is through the collector and his roll. So the roll ought to be delivered by the time named, but whether delivered by that time or not, it is still to be delivered. We have, therefore, in the same sentence two directions of the Legislature, one of which is obligatory, and the other directory. The clerk must deliver a roll; but as to the time, that is not essential to the validity of the roll, or of the acts done under it. The question as to the certificate is more difficult. As I have said it is for those who assert that it is directory to make that out. I think that has not been done. No sufficient reason, in my judgment, has been shewn for so holding.

And I think when the whole scope and purpose of the legislation is considered, it is apparent that the certificate of the clerk was intended to be an essential step in the

Judgment. summary proceedings directed and provided by the Legis-
MAOLENNAN, lature for the collection of taxes. The Legislature might
J.A. have enacted that when the assessment was complete, and the rate for the year struck by by-law, the taxes should at once be payable, and that if not voluntarily paid by the ratepayers to the treasurer, they should be collected by action like ordinary debts. The Legislature has not done that, but has provided a summary proceeding, authorizing an officer appointed by the municipality to demand payment, and in case of neglect or refusal, to seize and sell the goods of the defaulter. The initiation of this process is the duty of the clerk. He is to prepare the roll; he is to insert in it the several sums for which by law the ratepayer is liable; and it is of great importance that the roll shall be correct; for the debtor has no further opportunity of questioning or correcting it. His goods are liable to be seized for the sums so inserted by the clerk. That roll is to be delivered to the collector, and the Legislature has required that before doing so it shall be certified by the clerk. The certificate is intended not merely to identify it, but to ensure its correctness. The collector is entitled to the certificate for his protection; and the ratepayer is entitled to it as a guarantee that his goods shall not be seized for more than he ought to pay. But not only is the roll so certified and delivered the initiatory process which may result in the seizure and sale of the taxpayer's goods, but his lands may also, if necessary, be reached, and may be seized, and sold, and conveyed under the authority of the same roll, and for the satisfaction of the taxes comprised therein.

I was for some time inclined to think that the certificate was of less importance, owing to the fact that the collector is an officer of the municipality appointed by by-law for the very purpose of collecting the taxes, and that he derived his authority from his appointment, and not from the roll. But it is evident that the roll is essential to his authority. He cannot collect before he receives it, nor can he do so after he returns it. Section 122 says, that upon receiving

his collector's roll he shall proceed to collect the taxes therein mentioned. When he demands the taxes he is immediately to enter the date of doing so on the roll opposite the name of the taxpayer, and that entry is to be *prima facie* evidence of the demand. Without the roll, therefore, his authority is not complete; and it is, therefore, in the nature of a warrant in his hands, and ought to have the authentication and identification which the statute prescribes.

Judgment.

MACLENNAN,
J. A.

I think this view is very much strengthened by a consideration of section 231, and following sections of the Act. When the clerk has delivered the roll to the collector, the duty of the former in relation to the taxes is at an end. The collector is accountable to the treasurer, and the section just mentioned gives this latter official an extraordinary summary remedy against him and his sureties in case of refusal or neglect on his part to pay the sums contained in his roll, or to account for them as uncollected. The treasurer is authorized, without any action or suit, or even demand or notice, to issue a warrant to the sheriff to levy from the goods, lands and tenements of the collector and his sureties, the taxes unpaid and unaccounted for.

When it is considered that all these summary and severe proceedings are based upon the roll, which the clerk of the municipality is to prepare without any sanction or interference by the council, and which he is directed to certify before placing it in the collector's hands to be acted upon, I think it is impossible to hold that the duty of certifying is not imperative, or that an uncertified roll is sufficient authority for the exercise of the powers conferred by the Act upon the collector.

With great respect I think that the cases cited by the learned Chief Justice in his judgment do not support the judgment. In one of these cases, *Caldow v. Pixell*, 2 C. P. D. 562, Denman, J., quotes with approval from Maxwell on Statutes, a passage stating that in the absence of an express provision the intention of the Legislature is to be ascertained by weighing the consequences of holding a

Judgment. statute to be directory or imperative. If we apply that
MACLENNAN, principle to the present case, I think the result is clearly
J.A. in favour of holding the enactment to be obligatory.

The roll being the foundation of what may turn out to be a long series of proceedings affecting important rights, it is of the greatest importance to secure that it shall be genuine, and that it shall contain all the matters which are required by law. The certificate tends to secure both those objects, and no inconvenience can arise from holding it to be essential. To hold otherwise would deprive ratepayers of an important safeguard against erroneous, excessive or even wholly unauthorized demands being made upon them, and being enforced by summary execution.

I am therefore of opinion that the roll delivered to the defendant Dyer was defective for want of the certificate of the clerk, and that the alleged breaches of the bond sued on have not been established.

I think that the appeal should be allowed, and that the action should be dismissed with costs.

OSLER, J. A. :—

I agree.

BURTON, J. A. :—

This is a very hard action, and I am free to confess that during the argument I had a strong feeling that we ought to relieve the defendants, and my inclination would be to do so now if I could see my way to it.

The course pursued by the defendant Dyer was not by any means free from blame, and a perusal of the evidence has, to some extent, dispelled the unfavourable view I felt inclined to take of the apparently harsh conduct of the council in refusing to indemnify the defendant or to remedy the defect in the roll if it was possible to do so.

Instead, however, of bringing his complaint in a clear

way before the council and asking to be protected, he spoke to individual members of the council, and although seeking protection does not seem to have pointed out to them the reason for seeking their interference or the supposed defect in the roll, although I apprehend it must have been known to most of them.

Judgment.
BURTON,
J.A.

I think that the matter resolves itself into a dry question of law.

Sections 119 to 121 prescribe the clerk's duties in the preparation of the collector's roll and the roll of non-resident lands, and the question is whether that portion of section 120 which provides that he shall deliver the roll so prepared certified under his hand to the collector on or before the first day of October, is to be regarded as imperative or directory. As to that portion of it which relates to the time I entertain no doubt, and after much consideration I have come to the same conclusion as to its being certified or signed by him.

I think if it had been regarded as other than directory some provision would have been made to supply the omission in case of the death, illness or absence of the clerk, or his refusal to perform his duties. I think his signature was simply required as an authentication of the roll by the officer whose duty it was to prepare it of its being what it purports to be. It was in point of fact, the roll; it is not pretended that it is in any particular defective, and it was handed to and received by the collector without objection. This is, I think, the sole purpose of requiring his signature—he does not profess to authorize, and had no power to authorize the collector to receive or enforce payment of the moneys mentioned in it.

That authority was derived from the combined effect of the by-law appointing him and the clauses of the Assessment Act.

The by-law in express terms appoints him to collect the taxes for 1891, and the taxes which the Assessment Act authorized him to collect are those which appear in the roll. That roll would receive no additional force or efficacy

Judgment.
BURTON,
J.A.

from being signed by the clerk and it is conceded that it followed the assessment roll and was in strict conformity with the requirements of the statute.

I am of opinion, therefore, that the collector could legally have distrained upon the parties named in it.

The Interpretation Act leaves the law pretty much as it had been previously held by judicial decision to be, and does not aid us.

I was inclined at first to think the reference too wide, but on looking at the clauses of the Act which afford a summary remedy against the collector and his sureties, I can see no ground for limiting the reference. It is to be hoped that the council will do all in its power to mitigate the loss to these defendants, but I do not see my way to do so, agreeing as I do in the interpretation put upon the statute by the learned Chief Justice of the Queen's Bench.

Appeal allowed with costs,
BURTON, J. A., *dissenting.*

JARVIS V. CITY OF TORONTO.

Registry Act—Easement—Notice—Equitable Interest.

A municipal council who, with the oral consent of the owner, build a sewer through land, acquire an equitable right to compel a conveyance of so much of the land as is occupied by the sewer, but a purchaser of the land without notice of the consent or of the existence of the sewer is protected by the Registry Act.

Judgment of ARMOUR, C. J., affirmed.

THIS was an appeal by the defendants from the judgment of ARMOUR, C. J. Statement.

The action was substantially an action of trespass for entering upon the plaintiff's land, and excavating in and digging up the soil, and conducting and maintaining a sewer or drain therein, and carrying water and sewage through the same.

By their statement of defence, denying all the allegations in the statement of claim, except that the plaintiff was the owner of the land through which the drain passes, the defendants said that if any drain or sewer was constructed by them across said lands, it was constructed and maintained with the permission of the plaintiff and his predecessors in title; and that the defendants were empowered and entitled to enter upon said lands to make necessary repairs to said drain or sewer.

The defendants also contended that the plaintiff's only remedy was by arbitration to ascertain the amount of the compensation, if any, to which he was entitled under the Municipal Act.

The action first came on to be tried before BOYD, C., who dismissed it. That judgment having been set aside, and a new trial ordered, the case was heard before ARMOUR, C. J., who gave judgment for the plaintiff, restraining the defendants from maintaining or continuing the use of the drain or sewer in question, and from in any way interfering with the plaintiff's possession of the lands in the pleadings mentioned.

Argument. The city has no higher right than Yorkville, and it had at most a mere parol license which was revocable at law and also in equity as soon as the licensee exceeded the authorized use, and the use has been increased here : Wood's Law of Nuisances, 2nd ed., sec. 360 ; *McMillan v. Hedge*, 14 S. C. R. 736. The defendants must claim an actual interest in the land. It is a right to occupy a portion of the ground, and this right must be specifically set out by by-law so that in case of question as to compensation the nature of the right claimed can be ascertained : 55 Vic. ch. 42, sec. 483, *et seq.* (O.). Admittedly the corporation could not acquire this right *in invitum* except by by-law, and the inference is that no such right could be acquired by parol leave of the owner, certainly not so as to prejudice a subsequent purchaser for value without notice. The Registry Act, R.S.O. ch. 114, cuts such a right out. Section 83 expressly gives priority to the subsequent registered conveyance, even with the modified construction of *Peterkin v. McFarlane*, 9 A. R. 429 ; *Rose v. Peterkin*, 13 S. C. R. 677, which allows notice to defeat the section. But clearly want of notice cuts out every parol interest. This right is an equitable interest if it is anything, and nothing higher, and therefore directly within the Act. The same construction has been given in other cases, and the section has been held to apply to an alleged claim by parol to a water lot : *Bell v. Walker*, 20 Gr. 558 ; and to an alleged trust : *Grey v. Ball*, 23 Gr. 390 ; and to the equity to consolidate : *Miller v. Brown*, 3 O. R. 210. It is not in any way confined to equities capable of registration. See also *Tolton v. Canadian Pacific R. W. Co.*, 22 O. R. 204. In *Israel v. Leith*, 20 O. R. 361, no reference was made to this section, or to the cases decided upon it. There was a defect in the drain, and damage therefrom, so that some compensation is payable in any event : *New Westminster v. Brighthouse*, 20 S. C. R. 520 ; *Close v. Woodstock*, 23 O. R. 99 ; *Derinzy v. Ottawa*, 15 A. R. 712. At most the right acquired was an incorporeal hereditament which lay in grant only and could not be acquired by parol : *Fentiman v. Smith*, 4 East 107 ; subsequently followed in

Hewlins v. Shippam, 5 B. & C. 221. John Severn could do no more than give a mere license not binding on subsequent purchasers without notice. All the cases cited will be found on careful investigation to be based on the doctrine of notice. The corporation should either have insisted on a deed, or should have expropriated so as to place the matter on record. Otherwise there is no protection for subsequent purchasers. Being a mere license the subsequent conveyance was a revocation: *Hewlins v. Shippam*, 5 B. & C. 221. In this case it is pointed out that in *Winter v. Brockwell*, 8 East 308, the defendant was dealing with his own land only. In *McManus v. Cooke*, 35 Ch. D. 681, *Wood v. Leadbitter*, 13 M. & W. 838, is said to decide that where the license relates to something that lies only in grant it is revocable, and is revoked by conveyance. See also Goddard's Law of Easements, 4th ed., p. 524. After the revocation the maintenance was a trespass. In *Plimmer v. Mayor of Wellington*, 9 App. Cas. 699, and others of that class, there was no interest in land given, but a mere right to use land. No actual property was acquired. Clearly the innocent purchaser should be protected if possible: *Ross v. Hunter*, 7 S. C. R., at p. 312.

E. D. Armour, Q. C., in reply.

June 30th, 1894. The judgment of the Court was delivered by

OSLER, J. A. :—

[The learned Judge stated the facts as above set out and continued :]

The first question is as to the nature of the right or interest which the defendants, as it may be said, acquired from Severn. And it may be conceded for this purpose that, whatever it may be, whether license, easement or equitable right to the land in which the sewer was constructed, Severn would not have been permitted to interfere with the user by the defendants of the sewer which they

Judgment,
OSLER,
J.A.

had with his permission constructed thereon for the purposes they had built it for. The importance of the enquiry is with regard to the effect of the registry law upon the rights of the parties.

Section 479, sub-section 15, of the Municipal Act, 55 Vic. ch. 42 (O.), enacts that a corporation may pass by-laws for opening and making drains, sewers and water-courses, and for entering upon, breaking up, taking and using any land in the municipality in any way necessary or convenient for that purpose.

And section 483 provides that every council shall make to the owner of real property entered upon, taken or used by the corporation in the exercise of any of its powers, due compensation, etc.

What may thus be compulsorily taken from the owner by means of a by-law duly passed, may, of course, be acquired by agreement of the parties, and may be granted and assigned to the corporation by an appropriate conveyance.

Property thus acquired for the permanent and exclusive use of the municipality for the construction thereon of a sewer is not properly described as an easement: "The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land, and there is no easement known to the law which gives exclusive and unrestricted use of a piece of land. It is not an easement in such a case, it is property that passes:" *per* Lopes, L. J., in *Reilly v. Booth*, 44 Ch. D., at p. 26; approved in *Metropolitan R. W. Co. v. Fowler*, [1892] 1 Q. B. 165, S. C. [1893] A. C. 416, a case which in both Courts strongly supports the application of the passage quoted to land expropriated or acquired under the Municipal Act for the construction thereon of a drain or sewer. I refer particularly to Lord Herschell's speech, at p. 423, and to that of Lord Watson, at pp. 425-6.

What the defendants thus obtained from Severn, when he complained of the nuisance caused by their open drain,

speaking merely of the land in which they built the sewer, was something which they might have expropriated by by-law, or acquired by grant or conveyance *inter partes*.

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J.A.

What Severn did, however, was not enough to confer upon them a legal title to the land. There was a parol license coupled with a parol grant of something that was incapable of being granted by parol.

Wood v. Leadbitter, 13 M. & W. 838, 845, states the common law doctrine: "A license by parol coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant * * of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a valid grant, and it is therefore revocable."

See the notes to the American edition, p. 855, and *Hewlins v. Shippam*, 5 B. & C. 221, where it was held that where, for valuable consideration, the defendant had permitted the plaintiff to make, at his own expense, a drain on the defendant's land, the defendant might, nevertheless, stop it at his pleasure, because the easement of its continual use could only be granted by deed.

But in equity the rights of the party acting under the parol license or grant will be protected. Many authorities are referred to in the recent case of *McManus v. Cooke*, 35 Ch. D. 681. It will be sufficient to quote *Powell v. Thomas*, 6 Ha. 300, where the plaintiff had made a railway over the defendant's land without objection, the only dispute being on the question of price, and the Court of Equity restrained the defendant from prosecuting an action of ejectment.

In the case of the *Duke of Devonshire v. Eglin*, 14 Beav. 530, the defendant allowed the plaintiff to make a watercourse under his land to carry water to a town. The watercourse was made at the plaintiff's expense, and enjoyed for about nine years, and although there was no grant the defendant was decreed to execute a proper deed,

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OSLER,
J.A.

and a perpetual injunction was granted to restrain his interference with the watercourse.

In *Plimmer v. Mayor of Wellington*, 9 App. Cas. 699, 710, a jetty having been erected upon the land of the defendants with their assent, it was held that a license to use that land for the purposes of a wharfinger had thereby become irrevocable in equity, citing *Ramsden v. Dyson*, L. R. 1 H. L. 129.

What therefore the defendants, treating them as standing in the position of the village of Yorkville, acquired from Severn; was not some legal right or interest affecting the land arising otherwise than under an instrument capable of being registered, and therefore perhaps outside of the operation of the Registry Act : See *Israel v. Leith*, 20 O. R. 361.

It was, in my opinion, a right to compel Severn, or those claiming under him with notice, to execute a proper conveyance of so much of the land as was occupied by the sewer, and was therefore an equitable interest affecting land within the meaning of section 83 of the Registry Act. The title being a registered title, and the plaintiff clearly a purchaser for value without notice, he comes within and is protected by that and former sections of the Act.

The case of *Ross v. Hunter*, 7 S. C. R. 289, is, I think, in point. There the defendant had acquired by deed from the owner of an adjoining shop building a license or grant to carry up a brick wall over and upon the upper part of the south wall of that building. The deed was not registered, and the owner of the building subsequently sold it to a person through whom the plaintiff claimed, and he and subsequent purchasers duly registered their deeds, and were purchasers in good faith for valuable consideration without notice of the defendant's right under the license or grant from the original owner. The plaintiff then brought an action of trespass for maintaining the wall upon his property. It was held that the continuance of the illegal burden thereon since the fee had been acquired by him were, in law, fresh and distinct trespasses, for which

he was entitled to recover damages, unless he was bound by the license or grant of his predecessor in title; and it was held that he was not so bound by reason of the non-registration of that grant which became void against subsequent purchasers from the grantor who had registered their deeds. There is no substantial difference between the provisions of the Nova Scotia Registry Act and our own, except that we have in section 83 a clause which reaches the case of equitable interests.

Judgment.

OSLER,
J.A.

I may refer also to *Bell v. Walker*, 20 Gr. 538; *Grey v. Ball*, 23 Gr. 390; *Miller v. Brown*, 3 O. R. 210. *Israel v. Leith*, 20 O. R. 361, I notice only to say that it has no bearing on the present case.

It was contended that if the defendants had passed a by-law to expropriate the land it would not have been necessary to register it. That may be so in consequence of the public character of such an instrument, of which all inhabitants of the municipality may be bound to take notice. But there was in fact no by-law passed, and if the corporation had acquired this land by a grant and conveyance, I am not aware of anything in the Act which exempts them from the necessity of registering it. If then the plaintiff acquired the land not subject to the defendants' equitable interest therein, and I assume that is what the Court below must have held, he is entitled to maintain this action, and is not driven to take, indeed could not take, proceedings against the defendants to ascertain the compensation payable in respect of the land occupied by their sewer, and the trespasses committed by them in excavating and digging upon his property.

In my opinion the judgment should be affirmed.

Appeal dismissed with costs.

MILLOY V. GRAND TRUNK RAILWAY COMPANY OF CANADA.

Railways—Warehousemen—Carriers.

When a shipper stores goods from time to time in a railway warehouse, loading a car when a car-load is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers but of warehousemen, and in case of their accidental destruction by fire, the shipper has no remedy against the company.

Judgment of the Common Pleas Division, 23 O. R. 454, reversed.

Statement. THIS was an appeal by the defendants from the judgment of the Common Pleas Division, reported 23 O. R. 454, affirming, by a division of opinion, that of MACMAHON, J., at the trial.

The action was brought to recover the value of certain apples destroyed by fire under the circumstances set out in the report below, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 12th and 13th of March, 1894.

H. S. Osler, for the appellants. The original receipt was clearly in the character of warehousemen, and the apples were stored for the convenience of the plaintiff. The only question is whether that bailment was changed to the new bailment of carriers. The plaintiff alleges that the character was changed (1) by negligent delay to furnish cars, and (2) by his unaccommodated request for a car. But while negligence may give rise to an action it cannot change the relationship or character of the bailment. That this is so appears from the converse case of *Chapman v. Great Western R. W. Co.*, 5 Q. B. D. 278, where the delay of the consignee to take goods was held to relieve the carriers. Mere delay without direct instructions from the shipper could effect no change. Here, moreover, the delay was very trifling, and it would be unreasonable to make the defendants liable on that account, for if the goods had been shipped the shipping bill would have protected the

defendants even as carriers from an accident of this kind. **Argument.**

Nor does the request for the car change the character, nor even the promise of the car. This is pointed out in the dissenting judgment of ROSE, J., who alludes to the fact that the apples remained in the plaintiff's control till loaded by him, this being his duty. He also had to select them, brand them, agree as to freight, and indicate the destination, so that the contract of carriage had not been made, and an actual contract of carriage must be shewn to make the company liable as carriers: *Slim v. Great Northern R. W. Co.*, 14 C. B. 647. Mere delivery is not enough. Retention of control by the plaintiff prevented the liability as carrier arising: *Hutchinson on Carriers*, 2nd ed., sec. 89 *et seq.*; *Wilson v. Atlanta, etc. R. W. Co.*, 82 Ga. 386; *O'Neill v. New York Central R. W. Co.*, 60 N. Y. 138. If the defendants held the apples as warehousemen, and are liable on the ground of negligence in not furnishing a car, the damages are too remote: *Brodie v. Northern R. W. Co.*, 6 O. R. 180. The case is just the same as if the company had refused to carry the apples and the plaintiff had taken them to his own premises or to an independent warehouse and fire had there occurred. There might be in such a case an action against the company for refusal to carry, but as far as loss by fire is concerned the company would incur no liability.

Fullerton, Q. C., for the respondent. The plaintiff had no intention of dealing with the defendants as warehousemen, and while it must be admitted that, on the authorities, the defendants were warehousemen up to a certain time, still the relation between the parties is such that very slight evidence is sufficient to change the position. There was no intention of branding or necessity for branding. ROSE, J., lays much stress on this point, relying on *St. Louis, etc., R. W. Co. v. Knight*, 122 U. S. 79, but that case does not apply. There there was really a conflict between the consignor and the consignee as to qualities. That case would apply if different kinds of apples were to be sent to different parties. Here there was to be no

Judgment. The case of *Watts v. Boston and*
HAGARTY, Mass. 466, very clearly emphasizes t
C.J.O. and in *Hutchinson on Carriers*, 2n
 whole question is discussed.

Appeal

JOHNSON V. GRAND TRUNK RAILW
CANADA.

Railways—Negligence—Evidence of

A settlement of a pending action, agreed to by an
 out communication with her solicitor and wit
 facts, cannot stand, and its validity may be trier
 if pleaded in bar.

In an action to recover damages for causing th
 there is sufficient evidence of negligence to b
 jury, when it is sworn that the deceased was s
 railway track in a vehicle just before the passi
 immediately after the train passed the deceased .
 found dead at the crossing, and that the statu
 approach of the train were not given.

Judgment of the Queen's Bench Division, 25 O. R. 64.

Statement. THIS was an appeal by the defendants
 ment of the Queen's Bench Division, report
 and in that report and in the judgments in
 facts and arguments are fully stated.

The appeal was argued before HAGAR
 BURTON, OSLER, and MACLENNAN, JJ.A.,
 and 29th of May, 1894.

Osler, Q. C., for the appellants.

Stuart Livingston, for the respondent.

June 30th, 1894. HAGARTY, C. J. O. :—

I agree with the judgment of the learned Ch
 against the validity of the release set out as a de
 with the views expressed by my learned brother
 the Divisional Court, on the motion against the

The alleged release was obtained from the plaintiff after delivery of the statement of claim, and without any communication with her solicitor resident in the same town. There is always an unpleasantness and natural suspicion attached to a dealing of this character with a person situated as the plaintiff, apart from and without reference to her known legal adviser, into whose hands she has placed her cause to represent her in all matters connected with its prosecution.

Judgment.

HAGARTY,
C.J.O.

My learned brother has fully pointed out the objections to such a proceeding. The fact that all the circumstances attending this release had to be tried at the same sittings as the general merits of the action may possibly have been somewhat prejudicial to a calm consideration of the issue as to negligence. But this cannot well be avoided when such double defences are set up in bar. It was attempted to keep them separate by the learned Chief Justice trying the issues on the release without the aid of the jury.

I do not think we should interfere on this issue.

On the question of negligence, the evidence is not very clear.

The man was killed on the spot, and his death was undoubtedly caused by the train, or rather the engine striking his sleigh as he was crossing the railway track.

The act of collision was not distinctly seen. Jones, a witness, says he was standing about 160 feet from the car track. He saw the deceased coming down the road on a slow jog. He was not far from the track. "I saw the train come down and dash across the road. I said to Ayers, 'My God, that man is struck!'" We ran over—the deceased was upon the cattle guard, his head down and his feet up. It was about dusk, in the evening, and a misty night."

George Ayers was with the last witness, and had his back to the track. Jones said there was a train coming down, and they went back to see; says they were about fifty yards off when he heard the train; did not see the actual collision; found deceased as Jones described, in

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centre of track ; one horse close by the track ; the other about thirty feet away.

There was evidence from several witnesses that no bell or whistle was heard. Against this the engine driver and fireman swore that the bell was ringing all the prescribed time.

The railroad ran east and west. The deceased was going from south to north across the track. The sleigh and horses were found on the south side—the deceased in the centre of the track.

The engine driver swore that he did not see any accident. The only thing he saw was a horse's head right under the cab ; that "the horses struck them on the tail wheel of the engine ; the whole engine was past but about two feet, of course the whole tender was to pass at this time."

"You just saw the horse's head approaching ? Yes, I was just sitting over the trailer."

He says there was "no mark on the engine, only a small nipple on the water feeder that was bent ; my mate said there was hair upon that, and there was a nut that had caught some part of the sleigh—that is upon the tender." He said he saw the baggage car steps were broken. "When I saw the steps, I knew we must have struck the horse."

The Chief Justice refused to nonsuit.

The case was very fully laid before the jury, and the defendants cannot complain of the charge.

I do not think that the case should have been withdrawn from the jury.

There was no doubt as to the death being caused by the train as it crossed the highway. The man was seen driving leisurely towards the crossing ; a crash was heard and he and the horses were found killed.

There was contradictory evidence as to whether the deceased might or might not have easily seen the approaching train had he looked, and as is usual in cases of this nature, the absence or presence of the ordinary signals was most vehemently contested.

The law provides for the giving of these signals for the

protection of the travelling public. The latter have the right to expect that they will be given as the train approaches the highway.

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C.J.O.

It must, of course, be a question for the jury whether these signals were or were not given, and unfortunately there is almost always an array of evidence on one side of persons swearing that no signals were heard by them, standing in positions near or close to the place of accident; and on the other side, the positive affirmative evidence of the officials who actually gave the signals, as well as of others who heard them given. I cannot see how the trial Judge can do otherwise than leave the issue thereon to the jury.

I cannot see anything in the evidence here to make the case anything but the too common one, of a man driving his waggon and horses across the track, and either from want of thought not pausing to look or listen, or possibly listening but not hearing any signal of approaching danger.

With evidence before the jury, which they chose to accept, that no such signals were audible, I do not see how we can say that the plaintiff heedlessly ran into the train and thus worked his own injury.

The whole matter was for the jury. We cannot say they had no legal evidence to warrant these findings.

As I have before remarked, it would be well, perhaps, if we could adopt the rule said to prevail in some of the neighbouring States, that every driver approaching a railway crossing is bound to stop and satisfy himself that no train is coming.

I have before me a case of *Peart v. Grand Trunk R. W. Co.*, tried in 1882, and afterwards appealed by the defendants to this Court. (10 A. R. 191).

The man was killed instantly as he drove across the track, and the only account of the accident was by a person standing about 150 or 160 yards from the crossing. She said she saw the horse going upon the track and heard a crash. She had seen the deceased driving past, and she

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waited till he got past before she went to the track. And another witness said he heard a crack or crash about a mile or inside a mile where he was from the place of the accident.

There was a mass of evidence as to the signals; and the case went to the jury on the question of compliance or non-compliance by the defendants with the statutable provisions as to signals, with the usual direction as to contributory negligence, and that a man choosing to run into danger without taking proper precaution to protect himself, cannot recover.

The jury found for the plaintiff. The Divisional Court declined to interfere.

The defendants appealed to this Court, and the appeal was dismissed after a very full discussion of the authorities, Sir M. C. Cameron dissenting. I especially refer to the remarks of Patterson, J. A.

The company carried the case to the Privy Council. I have before me the judgment of the Judicial Committee dismissing the appeal.

I am unable to understand any argument in favour of the defendants' view from the subsequent case of *Wakelin v. London and South Western R. W. Co.*, 12 App. Cas 41.

The sole and only evidence offered was that the body of the deceased was found on or close to the track.

No one witnessed the accident, and beyond its being clear that he had been killed by impact of a passing train, there was nothing to shew a right to recover.

It is suggested here, as in the *Wakelin* case, that the man ran into the train and not *vice versa*.

The Lord Chancellor said: "If a man runs across an approaching train so close that he is struck by it, is it more true to say that the engine ran down the man or the man ran against the engine? Neither man nor engine were intended to come in contact, but each advanced to such a point that contact was accomplished."

I cannot see any safe ground on which we can interfere.

OSLER, J. A. :—

Judgment.

OSLER,
J.A.

I think the defendants, though they intended to settle fairly with the plaintiff, and paid her what I cannot but think, as things stood at the moment, might be regarded as a fair compensation, yet failed to leave it open to her to fortify herself with the independent advice she was entitled to, considering that she then to their knowledge had a solicitor who was carrying on for her this very action. The settlement should have been made through the medium of the solicitor, or if that was not absolutely essential there should not have been any overstatement or misstatement of facts to induce her to accept the proposed settlement. I do not see how we can overrule the judgment of the trial Judge on this point.

Then as to the evidence. There certainly was evidence, as it must be called, of the neglect of the defendants to give the statutory warning of the approach of the train to the crossing. The deceased was seen just approaching the crossing, and immediately afterwards the train was seen to flash past, and the man and his horses were at once discovered to have been killed. I think there is here as much evidence for the jury, or more than there was in the case of *Peart v. Grand Trunk R. W. Co.*, 10 A. R. 191. The judgment of this Court was affirmed by the Judicial Committee. Surely it was a proper inference for the jury to draw that the deceased drove on the track in consequence of the defendants' omission to give the signal of the approach of their train. Had he lived to bring an action, and said no more than that he had not seen or heard the train, the case could not have been withdrawn from the jury, though much might have been obtained from him to support a defence of contributory negligence. *Wakelin v. London and South Western R. W. Co.*, 12 App. Cas. 41, I only refer to to say that it has not been overlooked, but it has no bearing on the case in hand.

I cannot draw any overruling inference that the deceased ran into the train from the position in which he and

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J.A.

his horses were found. All I can say as to that is, that I think the jury might have done so. But that is not a reason to interfere with their findings which are opposed to that contention.

The appeal must be dismissed.

BURTON, and MACLENNAN, JJ.A., concurred.

Appeal dismissed with costs.

HOWDEN V. LAKE SIMCOE ICE COMPANY.

Negligence—Evidence of—Nuisance—Highway.

Allowing a broken down waggon to remain on the highway, clear of the track of a street railway, for nearly two hours, is not in itself sufficient evidence of negligence to support an action by a person who strikes against the waggon while passing in a street car. Such a broken down waggon does not become a nuisance or obstruction to the highway, until, having regard to the difficulty of removing it, it has been allowed to remain thereon for an unreasonable time.

Judgment of the County Court of York affirmed.

Statement.

THIS was an appeal by the plaintiff from the judgment of the County Court of York.

The defendants' servant was driving a heavily laden waggon along King street, in the city of Toronto, when the reach or coupling-pole suddenly broke, allowing the hounds of the front and hind wheels to drop down. The servant left the waggon standing on the street at the point where the accident occurred, and detaching the horses went to the defendants' stables to procure appliances and assistance to repair the injury and to enable the waggon to be safely removed. No one was left in charge. The waggon stood close to the north track of the street railway, the space between the line of the waggon box, which

extended over the wheel sufficiently to make the projection of the box the nearest point of obstruction, to the side of any passing street car being from six to twelve inches. The waggon remained in this position for about an hour and three quarters. A number of street cars passed the obstruction without accident during this period; but the plaintiff, while acting as conductor on an open trailer on his first trip for the day, stepped out backwards just before reaching the waggon from one of the compartments of the car to the foot-board with the intention of walking along the foot-board to the front of the car to take a fare, and was struck by the waggon-box and knocked violently off the foot-board, sustaining severe injuries. Statement.

The action was tried before His Honour Judge Morgan, and a jury, when the plaintiff was nonsuited, the learned Judge holding that there was no evidence of negligence.

This judgment was affirmed in term by His Honour Judge McDougall, who, without dealing with the question of negligence, held that the plaintiff had been guilty of contributory negligence.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 25th of May, 1894.

George Kappeler, for the appellant, contended that the waggon had been left on the street an unreasonable time, and that the case should have gone to the jury on this point.

Bruce, Q. C., for the respondents, contended that there was nothing to leave to the jury, citing *Original Hartlepool Collieries Company v. Gibb*, 5 Ch. D. 713; *Doyle v. Wragg*, 1 F. & F. 7; *Moffatt v. Bateman*, L. R. 3 P. C. 115; and *Beven's Law of Negligence*, p. 958. He also contended that the plaintiff was in any event guilty of contributory negligence, citing *Callender v. Carlton Iron Co.*, 9 Times L. R. 646, 10 Times L. R. 366.

Judgment. June 30th, 1894. HAGARTY, C. J. O. :—

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C.J.O.

It was pressed in argument that the fact of the defendants having allowed the waggon to remain so long in this position, was proof of negligence on their part. But the delay in removing it for nearly two hours was not a cause or reason for the injury to plaintiff. There was full room for the street car to pass. The plaintiff by stepping outside the car put himself in the line of obstruction. Several cars had passed the broken down waggon back and forward while lying thus close to the track. This was the plaintiff's first trip that afternoon, and he was not aware of the accident to the waggon. He admits that he did not look ahead before stepping out on the step or board. If he had so looked he must have seen how close they must pass. Now the danger from the waggon was no greater or different if it had been a carriage or waggon in slow motion, which the car was overtaking, or which was approaching equally close in the opposing direction. In either case, if there had been any danger in passing, such danger would be at once seen by any conductor or passenger who for any purpose stepped out laterally beyond the width or space required for the passage of the car and its living freight.

I do not think a case was made out to charge the defendants with actionable negligence in the occurrence of this injury to the plaintiff. The accident occurred in the full daylight.

I do not think it was necessary to have left the question of contributory negligence to the jury. The nonsuit was for the absence of actionable negligence on the defendants' part.

I am unable to see evidence thereof.

OSLER, J. A. :—

I agree in dismissing the appeal on the ground that there was no evidence of negligence reasonably proper to submit to the jury considering the time when the defendants'

waggon broke down and the time when the plaintiff met with the injury he complains of ; in short, that there was no evidence that the defendants' waggon had been left where it broke down for an unreasonable time so as to form an obstructive nuisance in the highway: *Original Hartlepool Collieries Company v. Gibb*, 5 Ch. D. 713, at p. 721. The driver of a waggon does not warrant that it will not break down when he is using the highway by driving thereon in a reasonable manner, and some time must necessarily elapse before it can be removed. If it is not left there an unreasonable time for that purpose the highway is not being used by it in an unreasonable manner. It has not become a nuisance in the highway, and is as regards its owners' liability not otherwise than a waggon in motion would be. This differs the case from *Clark v. Chambers*, 3 Q. B. D. 327, in which it was held that if a person places or leaves a dangerous obstruction on the highway—and this broken down waggon of the defendants might undoubtedly become a dangerous obstruction just as a pile of stones or rubbish left on the highway would be—he is bound to take all necessary precautions to protect persons exercising their right of way, and if he neglects to do so he is liable for the consequences.

Judgment.

OSLER,
J. A.

BURTON, and MACLENNAN, JJ.A., concurred.

Appeal dismissed with costs.

SAMUEL ET AL. V. FAIRGRIEVE ET AL.

Bills of Exchange and Promissory Notes—Patent of Invention—Transfer of Patent—"Given for Patent Right"—53 Vic. ch. 33, sec. 30, sub-sec. 4 (D.)—Consideration—Composition Agreement.

Sub-section 4, of section 30, of the Bills of Exchange Act, 1890, 53 Vic. ch. 33 (D.), requiring notes, the consideration of which consists in whole or in part of the purchase money of a patent right, to have thereon the words "given for a patent right," does not apply to notes given by a firm to cover the separate debt of one of the partners, one inducement to the unindebted partner for joining in the notes being, to the knowledge of the creditor, the transfer to him by the indebted partner of an interest in a patent.

An advance of money by a creditor to a debtor whose debt has been released by a composition agreement is sufficient consideration for notes given by that debtor and his partner to the creditor for part of the released debt.

A consideration is necessary to support a subsequent promise to pay a debt or the balance of a debt which has been released by the creditor or discharged by a deed of composition or discharge.

Austin v. Gordon, 32 U. C. R. 621, observed upon.

Judgment of the Common Pleas Division, 24 O. R. 486, reversed.

Statement.

THIS was an appeal by the plaintiffs from the judgment of the Common Pleas Division, reported 24 O. R. 486.

The plaintiffs were wholesale merchants carrying on business at Toronto, and brought the action upon three promissory notes for \$1,000 in all, made by the defendants, then carrying on business in partnership under the name of Fairgrieve & Craig, in their favour. Before the formation of this partnership Fairgrieve was indebted to the plaintiffs in the sum of \$2,352.22, and he having become financially embarrassed a composition agreement was entered into between him and his creditors by which the creditors, including the plaintiffs, agreed to accept in full discharge of their claims against him the sum of twenty-five cents on the dollar of their claims, and this composition was in due course paid to the plaintiffs and the other creditors.

Subsequently Fairgrieve gave to the plaintiffs two notes for \$880.10 and \$884.06, respectively, this being the balance of their claim, and as to whether this was done in pursuance of a pre-existing agreement entered into when the

composition agreement was signed by the plaintiffs Statement.
different views were taken in the judgments. After this, in November, 1890, Craig went into partnership with Fairgrieve, and at the suggestion of the plaintiffs Craig agreed to purchase a half interest in a patent, of which Fairgrieve was the owner, in consideration of \$700, \$200 to be paid to Fairgrieve out of Craig's share of the income of the business, and \$500 to be paid by the firm becoming responsible to the plaintiffs to the extent of \$1,000, and the notes in question were then given. At the same time the plaintiffs lent to Fairgrieve \$200, taking from him a note for \$964.16, being the balance of the old indebtedness plus this \$200.

The action was tried on the 23rd of June, 1893, at Toronto, before ROBERTSON, J., who afterwards gave judgment in the plaintiffs' favour, but that judgment was reversed by the Common Pleas Division on the ground that the notes were given in consideration of the transfer of a patent right and were void, not having the statutory warning upon them.

The plaintiffs appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 15th of May, 1894.

Watson, Q. C., and James Parkes, for the appellants. Sub-section 4 of section 30 of the Bills of Exchange Act, 1890 [53 Vic. ch. 33 (D.)], is relied on as making the notes void. But this sub-section does not apply. Here there was no sale by the plaintiffs of any patent right, and to put these words on would have been stating an untruth. Sub-section 6 imposes a penalty. The argument of the respondents must go far enough to make the makers of this note liable to this penalty. The cases cited below do not aid the respondents. They relate to cases before the amendment and in them actual fraud was proved. A fair test would be to take the case as if the patent right had not been assigned to Craig. Clearly that would be no defence as against the plaintiffs.

Argument. They were not interested in Fairgrieve's promise and made no agreement to convey any interest in a patent. The section is clearly aimed at the suppression of fraud by patent rights vendors. Another test would be to consider Craig as now on trial for breach of the section. Then it has been contended that there was no consideration for the notes. But this is an unfounded argument. There was no bargain invalidating the composition. The giving of the notes by Fairgrieve was not a condition or part of the composition, and there was perfectly good consideration for the making of these notes by Fairgrieve. The agreement to take twenty-five cents on the dollar did not wipe out the debt. Payment of the balance might not be enforceable but the existence of that balance was perfectly good consideration for any promise to pay it : *Austin v. Gordon*, 32 U. C. R. 621; *Adams v. Woodland*, 3 A. R. 213; *Lee v. Muggeridge*, 5 Taunt. 36. It may be contended, however, that signing the release wipes out the debt but this is answered by *Stafford v. Bacon*, 25 Wend. 384. Moreover there was direct consideration to both partners by the advance of \$200.

Moss, Q. C., and *C. W. Thompson*, for the respondent Craig. It is quite clear on the evidence that Craig received no consideration. This is an attempt with Fairgrieve's connivance to make Craig pay an alleged indebtedness of Fairgrieve's. The statute is very wide, and the notes come within it. The assignment of the patent is the direct consideration for the giving of the notes, and this was done at the plaintiffs' suggestion. The assignment was made at their request, and for their benefit. Craig had the use of the patent under the articles of partnership and there was no consideration. The plaintiffs are in no better position than if Craig had given notes to Fairgrieve, and these had been endorsed over to the plaintiffs. Clearly they would have been bad then without these words upon them, for admittedly there was knowledge. The cases are fully collected in *Johnson v. Martin*, 19 A. R. 592, and one cannot indirectly evade the Act. Moreover on the other

branch the plaintiffs must fail. There was clearly a fraud **Argument.** on the composition, and the agreement to give the notes was either absolutely void and fraudulent, or at least there was no moral obligation to support the subsequent promise. The obligation only exists where liability to pay has been extinguished by operation of law, as by the Limitation Acts or the Insolvent Act, but where the discharge arises by the voluntary act of the creditor himself there is absolutely no obligation left, and there is nothing to support a subsequent promise. See *McKewan v. Sanderson*, L. R. 15 Eq. 229; *Geere v. Mare*, 2 H. & C. 339; *Fisher v. Bridges*, 3 E. & B. 642; *Jackman v. Mitchell*, 13 Ves. 581; *Coleman v. Waller*, 3 Y. & Jer. 212; *Smith v. Cuff*, 6 M. & S. 160; Pollock's Law of Contracts, 5th ed., p. 169; Addison on Contracts (Abbott's ed.), vol. 1, p. 10 (n). Here there was an absolute voluntary discharge: *Warren v. Whitney*, 24 Me. 561; *Hale v. Rice*, 124 Mass. 292.

Watson, Q. C., in reply.

June 30th, 1894. OSLER, J. A. :—

I am of opinion that the notes sued on are not notes, or renewals of notes, the consideration of which consists wholly or in part of the purchase money of a patent right within the meaning of section 30 of the Bills of Exchange Act, 1890, so as to be void in the hands of the plaintiffs, because the words "given for a patent right" were not written nor printed prominently and legibly across the face thereof before the same were issued, as the Act requires. Craig was, as we may assume, indebted to Fairgrieve in respect of some interest in a patent right which the former had sold to him. Fairgrieve was also, as we may for the present assume, indebted to the plaintiffs, who were desirous of obtaining the security of the firm of Fairgrieve & Craig for such debt. Fairgrieve & Craig accordingly gave the plaintiffs these notes to secure the former's debt to them. As regards the plaintiffs the sole consideration was their

Judgment.

OSLER,
J. A.

debt. On a plea of want of consideration the existence of the debt is all they would have to prove as the consideration moving from them to the makers or some new or further consideration moving in a similar manner: *Currie v. Misa*, L. R. 10 Exch. 153; *Sowerby v. Butcher*, 2 C. & M. 368. And if they could prove nothing but the sale of the patent to Craig that would be no consideration for them. The notes were not in any sense "given for a patent right." Given to whom? The patent right does not enter into them at all; they would be just as valid in the plaintiffs' hands as if there had been no sale of the patent right; they are the joint notes of the vendor and purchaser of the patent right, given to a third party to whom the former is indebted. The liability of Craig for the purchase money of the patent depends upon and can only be enforced under the agreement. Were Fairgrieve to pay the notes he could have no claim upon them against Craig, and I do not see how the plaintiffs' title to them can be affected by the facts, whether known to them or not, which induced Craig to allow the debt to be assumed as a partnership liability. The defence under the statute, therefore, in my opinion fails.

Two other grounds of defence are relied upon which, though not dealt with by the Court below, must now be examined. The first is that the notes, or those for which in whole or in part they were given in substitution or in renewal, were so given in pursuance of a fraudulent agreement between the plaintiffs and Fairgrieve that if the plaintiffs would come into a composition of twenty-five cents on the dollar, which he was making with all his other creditors, and execute a release of the balance of their claim as all the other creditors were doing with regard to theirs, he would, notwithstanding such composition and release, give the plaintiffs his notes for the seventy-five cents on the dollar so released. And (2), apart from any question of a fraudulent agreement, that such notes given for the debt so released were without consideration.

It appears that a deed of composition was entered into by Fairgrieve with the plaintiffs and his other creditors, dated 11th August, 1890, by which all the creditors agreed to accept a composition of twenty-five cents on the dollar in full of their debts. The terms of the deed in this respect are as follows: That in consideration of the premises and of the party of the second part (Fairgrieve) covenanting, as he hereby does, with the parties of the first part (the creditors) to pay them respectively a composition of twenty-five cents on the dollar of their respective claims against him, as set forth in the schedule, in three equal instalments in three, six and nine months from the date hereof, and to give his paper therefor, and in further consideration on receipt of such composition notes, they, the said parties and firms each for himself and themselves respectively, do release and discharge the party of the second part from all their and each of their respective claims against him and all cause and causes of action whatever, saving always the said composition notes.

Judgment.

OSLER,
J.A.

The composition notes were given and afterwards paid. At the time they were so given, which was some time after the date of the composition deed, the plaintiffs demanded and the debtor gave two other promissory notes bearing date 11th August, 1890, for \$880.10, and \$884.06 at five and six months respectively for the balance of their debt. Fairgrieve and Craig soon afterwards entered into partnership, and the plaintiffs thinking that their claim would be better secured by the liability of the firm than of Fairgrieve alone procured the firm to give the notes now sued on dated 18th February, 1891, amounting in all to \$1,000 in substitution to that extent of the other two. For the balance, including a further sum of \$200, which they then lent to Fairgrieve, they took his own note for \$964.16 due 21st August, 1891.

With regard to the two notes of the 11th August, 1890, it would seem to be of little consequence, as regards the plaintiffs' right to recover thereon, if they were the notes now in question, whether they were given in pursuance of

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OSLER,
J.A.

a fraudulent arrangement or not. If they were so given, that is to say, if the plaintiffs became parties to the deed on the terms that notwithstanding the release thereby represented to the other creditors to have been given, notwithstanding the representation thereby made by them to other creditors that all creditors were coming into the composition on equal terms, yet that by a secret agreement between the plaintiffs and their debtor the latter was afterwards to give these notes for the balance of his debt, they would unquestionably be void as a fraud upon other creditors: *Lewis v. Jones*, 4 B. & C. 511; *Cockshott v. Bennett*, 2 T. R. 763; Forsyth on Creditors, ch. 10; *Geere v. Mare*, 2 H. & C. 339; *Coleman v. Waller*, 3 Y. & Jer. 212.

And if there were no corrupt agreement between the parties, yet inasmuch as the debt was released by the composition deed, there was no consideration for the notes afterwards given for the difference between the composition and the original amount of the debt. The distinction between that case and the case of a note given for a debt which had been barred by the Statute of Limitations or by proceedings in bankruptcy (if indeed as to the latter there is any distinction) seems to be that by force of the statute or the order of discharge the remedy only is barred; the debt still exists though in a dormant condition, and is a good consideration for a new promise to pay it: *Heather v. Webb*, 2 C. P. D. 1, 5, 8; *Warren v. Whitney*, 24 Me. 561; *Hale v. Rice*, 124 Mass. 292. But where a release is given by the creditor the debt is absolutely extinguished and gone and a subsequent parol promise made without consideration cannot revive it. See *Ex parte Hall*, Deacon 171, where a note given for the remainder of a debt which had been released by a deed of composition and discharge was held to be a *nudum pactum*, and consequently a bad petitioning creditor's debt. In *Cowper v. Green*, 7 M. & W. 633, a debt had been released by a deed of composition. The creditor had retained a lease which had been deposited with him by the debtor as a security for the debt, and the latter afterwards

verbally promised to pay the debt in consideration of the creditor giving up the security. It was held that as the debt had been released by the deed the plaintiff was no longer entitled to hold the lease as a deposit to secure repayment, and consequently that his giving it up could form no consideration for a promise by the defendant to pay the balance of the debt.

Judgment.

OSLNR,
J.A.

The obligation to pay a debt so released is no more than a moral obligation, and "the apparently undoubted rule of law at the present day is that a mere moral consideration cannot support an assumpsit, and this is also the rule in equity:" Chitty's Law of Contracts, 12th ed., pp. 35, 36, where the authorities are collected; Pollock's Law of Contracts, 5th ed., p. 170; Anson's Law of Contract, 5th ed., pp. 79-82. As regards a subsequent promise to pay a debt barred by proceedings in bankruptcy or insolvency, most of the modern Bankrupt Acts have either expressly declared that such a promise shall be void, or a larger effect has been given to the discharge than as merely barring the remedy: *Heather v. Webb*, 2 C. P. D. 1; *Jakeman v. Cook*, 4 Exch. D. 26. In our own Courts *Austin v. Gordon*, 32 U. C. R. 621, may be noticed, where a note given after the discharge of the maker in insolvency seems to have been held good without any new consideration. But in *Jones v. Phelps*, 20 W. R. 92, which is approved in *Heather v. Webb*, Bacon, Ch. J., decided broadly that where a debtor was discharged in bankruptcy a subsequent promise by him to pay the debt "was a mere *nudum pactum*, and therefore, according to a well-known principle of our law would not sustain an action." *A fortiori* must this be the case where the debt has been discharged by the act of the creditor himself.

I am unable to say after a careful perusal of the evidence that the learned trial Judge was wrong in holding that the plaintiffs had not signed the composition deed on the faith of a promise to give the notes for the balance of their debt. The only witness on this point is the defendant Fairgrieve.

Judgment.

OSLER,
J.A.

His evidence is not satisfactory, and one is strongly inclined to suspect that the plaintiffs put the matter much more strongly to him than he now seems willing to allow. He beats about the bush a good deal, but what he says comes to no more than that when the question of the composition was discussed, and the deed presented for signature, he told the plaintiffs that he hoped and expected to be able to pay the balance, and would do so if and when he could. And he finally says distinctly that when the deed was signed it was without any condition as to payment of the balance, and that these two notes were no part of the consideration or the giving of them a condition on which the deed was signed. When afterwards given they were given without consideration, and indeed, as the defendant Fairgrieve says, merely for the plaintiffs' accommodation, and no recovery could have been had thereon.

The next question is whether the notes sued on stand in any different position. They represent \$1,000, part of the amount of the two large notes, and were procured by the plaintiffs in the following manner: About the time when one of these notes had fallen or was about to fall due, Benjamin, one of the plaintiffs, suggested to Fairgrieve that the whole might in some way be made a firm liability. Fairgrieve refused. Then Benjamin put it to him that one-half interest or some interest in a patent belonging to him, which the firm were working, might be transferred to Craig, that Craig should buy it, and thus, as I understand it, that his liability for the purchase money might induce him to assume the plaintiffs' debt or part of it as a firm liability. After some pressure from Benjamin, and perhaps from Fairgrieve, Craig, who evidently was not anxious to buy, agreed to buy a half interest in the patent for \$700 payable as follows: \$200 payable to Fairgrieve out of Craig's share or income from the business, and \$500, not by his becoming liable to the plaintiffs to that amount, but by the firm becoming responsible to the extent of \$1,000 of the personal indebtedness of Fairgrieve to the plaintiffs on the notes. It is perhaps needless to say that this

ingenious transaction was devised and managed by the plaintiffs, who merit the sinister commendation of having "done wisely," or at least having tried to do so, because I think they would have been no better off than before if the notes for the \$1,000 had been handed over to them at this juncture. But Fairgrieve wanted some money, and Craig had none, or did not care enough about the matter to pay any. Fairgrieve evidently seeing his opportunity would not carry out the sale unless he could get the \$200, and the plaintiffs seeing it was likely to be off altogether and their chance of getting the firm's notes lost agreed to lend him that sum. Craig knew all this; indeed the plaintiffs' cheque for the \$200 was handed over through him. Thereupon the transfer of the patent was made, and the firm's notes for the \$1,000 and Fairgrieve's own note for the balance, including the \$200, given to the plaintiffs. I regret, I must say, to be obliged to hold that this scheme is successful, but the parties seem to have known what they were doing, and the \$200, cannot I think be regarded in any other light than as a consideration paid to Fairgrieve, with Craig's knowledge and consent, the consideration in short to both of them, for becoming liable to the extent of \$1,000 on Fairgrieve's discharged debt. For a new consideration will undoubtedly, as shewn by *Jakeman v. Cook*, 4 Exch. D. 26, support a new promise to pay the discharged debt. And such new consideration is in my opinion proved here. Had Fairgrieve alone made the new notes he could not possibly have said that he had not received a new consideration, and it was not necessary that the consideration should have moved to the defendant Craig himself personally. If it moved to a third person by his desire or acquiescence that is sufficient. Fairgrieve and Craig then in consideration of \$200 lent to Fairgrieve agree to become responsible to the extent of \$1,000 included in the old notes thus changing the position, as Fairgrieve himself puts it, as to that amount from a mere moral obligation or accommodation to that of a legal liability.

I do not quite apprehend the suggested difficulty that

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

the consideration was only \$200, while the new notes are for \$1,000. The point is that it is the agreed consideration, the whole consideration, and if that be so, no defence of partial failure of consideration could be sustained. We may think the consideration inadequate or the transaction an oppressive one, but it is what the parties have agreed to and if it is to be undone it must be on some other ground of defence than has been pleaded or proved. I think it is a transaction not creditable to respectable merchants, but I am obliged to say that in my opinion the judgment must be reversed, and that of the trial Judge restored.

HAGARTY, C. J. O. :—

I agree with the judgment just read.

MACLENNAN, J. A. :—

I agree that if the only consideration for the notes sued upon had been the unpaid balance of the original debt due from Fairgrieve to the plaintiffs the action must fail; and the question on the appeal is whether there is any other independent consideration. The consideration relied upon is the sum of \$200 lent by the plaintiffs to Fairgrieve at the time of receiving the notes.

Besides the notes in question Fairgrieve at the same time gave the plaintiffs a note for \$964.16, which was made up in this way. The whole unpaid balance of Fairgrieve's original debt which had been compounded and released by the plaintiffs was \$1,764.16. Of this the notes in question represented \$1,000; and the note for \$964.16 was made up of the balance of the old debt, \$764.16, and the \$200 lent by the plaintiffs to Fairgrieve. Now if these two transactions had been distinct and independent it could not be said that the \$200 was a consideration for the three notes making \$1,000 in all; and the question is were they in fact distinct and independent of each other. It is clear that the \$200 was lent to Fairgrieve alone, and

he alone became liable to pay it back, and it was included in the note which he alone gave. Then how does it affect the other three notes, so as to become a consideration for them? If it was no part of the consideration for these notes, then Fairgrieve could no more be liable upon them than Craig. But could Fairgrieve say it was not? I think he could not. As between the plaintiffs and Fairgrieve it is clear that the plaintiffs would not have lent the \$200 but for his giving both the notes in question and the other note for \$964.70, which he alone signed, and if so the case comes to this, that Craig was a party to giving the note of the partnership to the plaintiffs, for a transaction of value as between his partner and them, and did so with a full knowledge of all the facts. Indeed the transaction was carried out by Craig himself, for he it was who signed the name of the firm to the notes, and received from the plaintiffs the cheque for \$200 for his partner Fairgrieve.

Judgment.

 MAOLENNAN,
J.A.

I think, therefore, the defence of want of consideration fails.

On the question of the patent right I have had and still have doubts, but they are not sufficiently strong to lead me to differ from the conclusion come to by the other members of the Court.

I therefore agree that the appeal should be allowed.

BURTON, J. A.:—

I agree in thinking that the case does not fall within the section of the Bills of Exchange Act regarding securities given for the purchase of an interest in a patent right.

As to the other defence I am not disposed to take the charitable view of the transaction which seemed to impress the learned Judge, but even on the assumption that there was nothing fraudulent in the transaction I am of opinion that as to the notes for \$880 and \$884, there was no valuable consideration for the making of those notes, and that they could not have been enforced, and the giving up of those notes constituted no valid consideration for the notes

Judgment.

BURTON,
J.A.

sued on unless the loan of \$200 advanced by Benjamin to the defendant Fairgrieve can be relied on for that purpose.

I do not think it can be so relied on, and for this reason.

It is clear that Craig having already under the agreement the use of the patent was not at all desirous of acquiring a half interest in it. It was continually pressed upon him by Benjamin who was also pressing Fairgrieve upon the two promissory notes which Craig was under the impression could be enforced.

Benjamin conceived the idea that if Craig could be induced to purchase an interest in the patent at the price of \$700 he could prevail upon him to join in the firm's note for \$1,000 to secure a portion of the old claim. On the matter being discussed he consented to joining in the note, thus securing, as he supposed, \$500 of the purchase money of the patent, but he positively refused to pay the residue except by allowing it to be deducted from his future share of the profits.

When the matter had reached this stage, Fairgrieve apparently saw his opportunity of extracting from Benjamin some money, and the latter, anxious unquestionably that the matter should not fall through, agreed to advance him \$200, which Fairgrieve in one part of his evidence describes as a bonus, but which, I think, I could describe by a more apt phrase, but it was, as we see upon the whole evidence, a loan, not to the firm, but to Fairgrieve alone, from which Craig was to derive no benefit, and he swears, and I believe him, that although aware of the advance he was not aware of the purpose or the terms on which it was made.

Now, as it appears to me, these two things, the sale of the patent and the giving of the firm notes, were separate and distinct transactions, and should, for the purpose of considering the question upon which this case must turn, be looked at separately.

No doubt, from Benjamin's standpoint, he had it in contemplation from the first to use the sale of the patent as means to an end. It may be conceded that that sale

was a *sine quâ non*, but how is it to be regarded from Craig's standpoint? He was very indifferent about the sale, but anxious to relieve his partner from what he conceived to be an enforceable liability; he was willing, if that sale was carried out, to become liable, as he supposed, to the extent of \$500, with that object in view.

Judgment.

BURTON,
J.A.

Fairgrieve, knowing Benjamin's anxiety to have it carried out, demands \$200, and but for that it is quite upon the cards that the sale would never have been carried out; but upon his receiving that money his objections ceased, and the sale was carried out, and there that matter ended.

The counsel for the plaintiffs made a great many endeavours to commit Craig to an admission that the \$200 was given in connection with the notes, but he at all times denies it, and says positively and distinctly that his only object in going into the transaction was to relieve Fairgrieve from the two notes then pressing, and that there was no other consideration whatever for the notes sued on.

It is clear that that payment did not relieve Craig from the payment of any part of the purchase money of the patent; he still remained liable for the payment of that balance. He says if he had been anxious to obtain the patent, the \$200 yet to pay on it would have been forthcoming.

I think everything tends to confirm the evidence of Craig, and we find, therefore, Fairgrieve securing this bonus by his individual note for \$974, which is made up of that and the balance of the old indebtedness, which thenceforth ceased, to use Fairgrieve's favourite expression, to be a mere "moral obligation."

I adopt Craig's evidence, and upon that I have come to a clear conviction that so far as he is concerned there was no consideration for the notes sued on.

But I suppose if there was any consideration as between Benjamin and Fairgrieve that would be sufficient to validate the note as against both, but for the reasons I have referred to I think that the payment he extorted forms no part of the consideration of the notes sued on.

If it had not been paid it is possible these notes might

Judgment.
BURTON,
J. A.

never have been given, but it was given in order to induce Fairgrieve to carry out the sale of the patent and for nothing else. He did not require any inducement to sign the notes sued on, for he cared little about making his partner liable so long as he induced these creditors to cease their importunities.

Fairgrieve himself at one portion of his examination I think disclosed the truth, when in answer to his own counsel, when asked to say that the \$200 formed part of the consideration for the notes said: "I do not think the \$200 was taken into consideration at all," and then his counsel adds: "It was a material consideration, because without it the transaction could not have gone through." That I think correctly describes the matter. For purposes of his own Fairgrieve assumes the position that he will not allow the sale of the patent to go on. Benjamin then suggests that the \$200 required might be forthcoming, and then the sale was completed.

That the giving of the notes followed immediately after does not affect the case.

I think, with great respect, that the learned Judge was under a misapprehension as to what would be a sufficient consideration when he remarked: "He did receive something for the notes, he received an assignment of half the patent; that was quite a valuable consideration, or he would not have given it." No doubt, that was a sale for value for which he was to pay \$1700; but how could that form any consideration for giving a note to the plaintiffs? And again he says: "He signed these promissory notes according to his own account in consideration of Benjamin loaning Fairgrieve \$200." In that the learned Judge is mistaken. From first to last of Craig's evidence there is no such statement; on the contrary he says he had no idea what the loan to Fairgrieve was for.

I am of opinion that upon these grounds the plaintiffs are not entitled to recover, and that the appeal should be dismissed.

Appeal allowed with costs,
BURTON, J. A., *dissenting.*

ROBERTS V. MITCHELL.

Negligence—Nuisance—Highway—Damages—Overhanging Cornice.

The owner of a building, from which a cornice overhanging the sidewalk falls, because the nails fastening it to the building have become loosened by ordinary decay, and injures a passer-by, is liable in damages without proof of knowledge on his part of the dangerous condition of the cornice, the defect being one that could have been ascertained by him by reasonable inspection.

Judgment of FALCONBRIDGE, J., affirmed.

THIS was an appeal by the defendant from the judgment of FALCONBRIDGE, J. Statement.

The plaintiff, while walking on Elgin street in the city of Ottawa, was struck by a piece of overhanging woodwork that fell from the defendant's building and was severely injured, and brought this action to recover damages. It was tried at the Ottawa Spring Assizes of 1893, before FALCONBRIDGE, J., who gave judgment in the plaintiff's favour for \$300, the amount of damages being agreed on between the parties. It was shewn that the overhanging woodwork had been fastened by nails to the building, forming part of an ornamental cornice, and that it had fallen because of the nails having become loosened by ordinary decay. The building had been built in 1871, about twelve years before the defendant bought it, and it was admitted that he had no knowledge or reason to think that the cornice was in a dangerous condition. He had never, however, had the building inspected or repaired, and it was shewn that by an inspection the dangerous condition of the cornice would have been discovered.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 16th of May, 1894.

Osler, Q. C., for the appellant. On the admitted facts of this case the plaintiff must fail. There was no evidence whatever of direct or implied negligence, and the occurrence

Argument. was an accident. Without some notice or warning of the danger the defendant could not be made liable: *Lazarus v. City of Toronto*, 19 U. C. R. 9; *Landreville v. Gouin*, 6 O. R. 455; Thompson on Negligence, at p. 1227; Wharton's Law of Negligence, 2nd ed., secs. 187, 825, 840, 842; *Morris v. New York Central R. W. Co.*, 106 N. Y. 678; *Crafter v. Metropolitan R. W. Co.*, L. R. 1 C. P. 300; *Case v. Chicago, etc., R. W. Co.*, 64 Ia. 762; *Welfare v. London and Brighton R. W. Co.*, L. R. 4 Q. B. 693. The plaintiff is attempting to rely on the *res ipsa loquitur* doctrine, but that doctrine is exploded: *Canadian Pacific R. W. Co. v. Chalifoux*, Cassels' Supreme Court Digest, p. 749.

G. F. Henderson, for the respondent. The omission to inspect or repair the building for this long period is in itself sufficient evidence of negligence to make the defendant responsible. He was bound to take reasonable precautions to keep the building in repair, and not having done so is responsible for the injury: Pollock's Law of Torts, 3rd ed., p. 459; *Great Western R. W. Co. v. Fawcett*, 1 Moo. P. C. N. S. 101; *Webb v. Rennie*, 4 F. & F. 608; *Brown v. LeClerc*, 22 S. C. R. 53; *York v. Canada Atlantic S. S. Co.*, 22 S. C. R. 167.

Osler, Q. C., in reply.

June 30th, 1894. HAGARTY, C. J. O. :—

I think the verdict for the plaintiff was fully warranted by the evidence adduced in this case. A wooden cornice attached by nails to other woodwork in the defendant's roof overhung the sidewalk and fell on the plaintiff, simply, as it would seem, from the nails or fastenings having become loosened by ordinary decay in the lapse of years. The defendant had lived ten years in the house. It was built in 1871, and was twenty-two or twenty-three years old, and there was no evidence that during all that period any inspection had been made or repairs done.

The defendant's position would be much stronger had he just come into the house and had no time for inspection or examination before the cornice fell.

It is not necessary to decide on his liability in such a case as he had been ten years in occupation. The cornice was a mere ornamental adjunct to the house, and, as it seems to me, the public passing underneath it had a reasonable right to assume that the owner or occupant had taken reasonable care to ensure its not breaking away from its fastenings.

Judgment.

HAGARTY,
C.J.O.

The evidence was strong that its fall was the natural result of gradual decay and loosening of the nails.

I think the law cannot allow immunity from damages in such a case, merely because the owner has omitted for years to do anything in the way of inspection or repair.

There may be no outward appearance of giving way, yet it must be remembered that time is always slowly working in the loosening of fastenings such as these, when nails in woodwork are practically supporting the overhanging weight.

Out of the multitude of cases we may notice *Tarry v. Ashton*, 1 Q. B. D. 314; *Kearney v. London, Brighton and South-Coast R. W. Co.*, L. R. 6 Q. B. 759.

I think that the appeal must be dismissed.

OSLER, J. A.:—

The plaintiff's case is that he was walking on the highway in the city of Ottawa, and while passing under the projecting eave of a building belonging to the defendant was struck and injured by the falling therefrom of a bracket or cornice which had been fastened thereto, and which formed part thereof. The defendant had owned the building for several years. He was ignorant that the cornice was loose or defective. He had never caused it to be examined or tested, but the building had been erected by a competent contractor several years before he bought it, and there was no reason to suppose, from any external indication, that it was out of repair. Under these circumstances the defendant insists that he is not liable for the injury the plaintiff has sustained.

Judgment.
MACLENNAN,
J.A. neighbour's land and cause it damage; or a field of ripe wheat, which might be fired by lightning and do mischief. I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but would be liable if through any defect, though latent, the water escaped or the bricks fell." Further on he says that the case of damming a water course, and the case of the chimneys, are cases of a reasonable use of property, in a way beneficial to the community, and that the principle which is applicable is *sic utere tuo ut alienum non laedas*.

This case is an answer to the defence which was urged upon us that the defendant did not know that the bracket was insecure or dangerous. I think the defendant was bound to see that it was safe. The risk of its being otherwise was his, and not that of the public using the street.

It was also urged upon us that the defendant could not be held liable because the house had not been built by him. That clearly can make no difference. A man who buys a house takes it with all its imperfections, and the attendant risks. The duty of the former owner ceases with his ownership. The duty is one which is annexed to the property, which attaches to the owner in respect of his property.

I think the judgment is right, and that the law is correctly stated in Pollock's Law of Torts, 3rd ed., p. 461, where, after citing several authorities, he says that the owner of property abutting on a highway is under a positive duty to keep it from being a cause of danger to the public by reason of any defect either in structure, repair or use and management which reasonable care and skill can guard against.

BURTON, J. A. :—

I agree.

Appeal dismissed with costs.

PALMATIER V. MCKIBBON.

Ways—Dedication—50 Geo. III. ch. 1—Omnia præsumuntur rite esse acta.

A road was surveyed in 1834, and the surveyor's report was made to the Quarter Sessions in that year. The records were, however, lost or destroyed, and there was no evidence that the road had been adopted by the Sessions under the Act then in force, nor was there a record of any order directing it to be opened. It was, however, actually opened before 1853, with the assent of the owners of the land, and was used for several years and statute labour was done upon it:—

Held, that the maxim "*Omnia præsumuntur rite esse acta*" applied, and that the due adoption of the road by the Quarter Sessions should be presumed:—

Held, also, that the evidence of dedication was sufficient:—

Held, also, *per* MACLENNAN, J. A., that the expressions "laying out" and "opening" a road, are used in the Act 50 Geo. III. ch. 1, in an equivalent sense, and that actual work on the ground is not required before the road becomes a public highway.

Judgment of ROSE, J., reversed.

THIS was an appeal by the defendant from the judgment of ROSE, J. Statement.

The plaintiff was the owner of three lots at the east end of Point Traverse, in the township of Marysburgh and county of Prince Edward, and brought the action to restrain the defendant from trespassing upon these lots. A road ran across the lots close to the north shore of the Point, and the defendant contended that this was a public road, which he had the right to use, and this was the question in issue in the action.

The action was tried at the Picton Spring Assizes of 1892, before ROSE, J., and the facts, as shewn by the evidence, were shortly as follows:—One John Rose was, in 1834, pursuant to the Act 50 Geo. III., ch. 1, appointed surveyor of highways for the township of Marysburgh, and in the records of the Court of Quarter Sessions for that year a report by him laying out a road "following the shore" of Point Traverse, was minuted with a note that it was "confirmed by the Court." The papers relating to the matter could not be found, most of the records of the township having been destroyed by fire, these probably among them.

Statement. The road laid out by Rose was afterwards, with the consent of all parties interested, abandoned, and the road now in question adopted instead, and it was used till the year 1860, statute labour being done upon it. In that year one Walters, the immediate predecessor in title of the plaintiff, petitioned the township council for leave to close the road "by erecting a gate" at the line dividing the land owned by him from that owned by his neighbour to the west.

Walters gave to the council a bond conditioned as follows:—

"Now, the condition of this bond is such that if the above bound John Walters shall open or cause to be opened the road leading from lot No. 12 west of Point Traverse, to the end of said Point by the public applying for the opening of said road for public travel, and without he, Walters, or any other person, receiving any compensation for the land of said road, or for the removing of any obstruction that may be in said road at the time of the public application for opening said road, then this obligation to be void, otherwise to remain in full force and virtue."

The council then passed a by-law closing the road from the west limit of Walters' land, the erection of the gate being the only act done to accomplish that purpose.

Some further facts are alluded to in the judgments.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 17th and 18th of April, 1894.

Aylesworth, Q. C., and *P. C. MacNee*, for the appellant. The judgment of the Court of Quarter Sessions ordering the road in question to be opened, cannot now, after the lapse of fifty-eight years, be reviewed and set aside in this action. Rose was a public officer; and his report was an award as such officer, confirmed by the proper Court, and the maxim, "*Omnia praesumuntur rite esse acta*" applies: *Rex v. Haslingfield*, 2 M. & S. 558; *Doe d. Nanney v. Gore*, 2 M. & W. 320; *Smith v. Redford*, 12 Gr. 316;

School Trustees of the Township of Hamilton v. Neil, 28 Gr. 408. Argument.

It must be assumed that the Sessions did all that properly ought to have been done to warrant the entry or minute: *Re Lawrence and Thurlow*, 33 U. C. R. 223; *Dickson v. Kearney*, 14 S. C. R. 743. The onus of proving irregularity is on the plaintiff: *Monk v. Farlinger*, 17 C. P. 41. It clearly appears that the original road laid out by Rose was abandoned with the consent and approbation of the predecessors in title of the plaintiff, and the present road was adopted in lieu thereof, and it thereupon became a public road: *Borrowman v. Mitchell*, 2 U. C. R. 155; *Dawes v. Hawkins*, 8 C. B. N. S. 848; *Purdy v. Farley*, 10 U. C. R. 545. The learned trial Judge relied upon *Regina v. Great Western R. W. Co.*, 32 U. C. R. 506; and *Re Lawrence and Thurlow*, 33 U. C. R. 223. In the former case the alleged road had never been regularly opened and no work or statute labour had been done on it, whereas the road in question in this action has been continuously and uninterruptedly used as a public highway, according to the locality and the requirements of the inhabitants, for over fifty years, and statute labour has been regularly performed upon it during all that period: *Regina v. Hunt*, 16 C. P. 145. The alleged by-law passed by the council of Marysburgh in 1860, is wholly invalid: *Regina v. McGibbon*, 28 C. L. J. 253. There is sufficient evidence of dedication: *Guelph v. Canada Company*, 4 Gr. 632; *Attorney-General v. Toronto*, 10 Gr. 436; *Mytton v. Duck*, 26 U. C. R. 61; *Regina v. Boulton*, 15 U. C. R. 272; *Poole v. Huskinson*, 11 M. & W. 827; *Malloch v. Anderson*, 4 U. C. R. 481; *Regina v. Yorkville*, 22 C. P. 431; *Johnson v. Boyle*, 11 U. C. R. 101; *Frank v. Harwich*, 18 O. R. 344; and performance of statute labour has been clearly proved: *Prouse v. Glennny*, 13 C. P. 560. Walters, the immediate predecessor in title of the plaintiff, by his petition to the council, and more particularly by his bond, admitted the existence of the road, and the plaintiff himself performed his own statute labour on the

Argument. road ; and he is now estopped from denying its existence as a public highway.

Clute, Q. C., and *J. A. Wright*, for the respondent. The requirements of 50 Geo. III., ch. 1, must be strictly observed and followed to deprive private individuals of their rights of ownership of land, and the defendant has failed to shew that the steps required by the Act were taken. He cannot therefore successfully contend that this is a public road : *Rex v. Sanderson*, 3 O. S. 103 ; *Regina v. Great Western R. W. Co.*, 32 U. C. R. 506 ; *Re Lawrence and Thurlow*, 33 U. C. R. 223. In the absence of strict proof of the establishment of a road under the Act, it ought to be presumed that the Sessions, for some good cause, declined to take the necessary and requisite steps to order and direct the same to be opened, and therefore, the maxim, "*Omnia præsumuntur ritè exacta*," does not assist the appellant. The origin of the road being duly accounted for, no dedication can be presumed, for the facts in evidence repel the presumption of dedication, and, moreover, the evidence throughout clearly shews an intention directly opposed to dedication, and the learned trial Judge has found, as a fact, that there was no dedication, and his finding should not be disturbed : *Belford v. Haynes*, 7 U. C. R. 464 ; *Regina v. Great Western R. W. Co.*, 32 U. C. R. at p. 517 ; *Dunlop v. York*, 16 Gr. 216. Statute labour if performed at all upon the alleged road was illegally and improperly done, and no public rights were or ever could be thereby acquired : *Regina v. Plunkett*, 21 U. C. R. 536 ; *St. Vincent v. Greenfield*, 15 A. R. 567 ; *Regina v. Hall*, 17 C. P. 282. The plaintiff's land being at the extreme end of a point with an irregular shore bounding it on the north, east and south, it is not now and never was at any time in the interest of the public that there should be a highway or public road across any part of his lands to any part whatever of the shore bounding them, and hence the public cannot acquire a highway by dedication or otherwise thereon : *Pells v. Boswell*, 8 O. R. 680 ; *In re Morton and St. Thomas*, 6

A. R. 323. The alleged road described in the records of the Quarter Sessions is without any certain or definite terminus, and, by reason thereof, the proceedings taken, in any event, would be null and void for uncertainty : *Rex v. Sanderson*, 3 O. S. 103 ; *Regina v. Rankin*, 16 U. C. R. 304 ; *In re Thompson and Bedford*, 21 U. C. R. 545 ; *St. Vincent v. Greenfield*, 15 A. R. 567 ; *In re Smith and Euphemia*, 8 U. C. R. 222 ; *Dennis v. Hughes*, 8 U. C. R. 444 ; *In re Brown and York*, 8 U. C. R. 596 ; *McIntyre v. Bosanquet*, 11 U. C. R. 460. If there ever was a public highway or road it was legally and properly closed up by the by-law of the township : *Grand Hotel Company v. Cross*, 44 U. C. R. at p. 173. There was at all events a formal abandonment or renunciation on behalf of the municipality of any right to the road over the plaintiff's land : *Vandecar v. East Oxford*, 3 A. R. 131.

Aylesworth, Q. C., in reply.

June 30th, 1894. HAGARTY, C. J. O. :—

I think this case is distinguishable on many grounds from such cases as *Rex v. Sanderson*, 3 O. S. 103, and others relied on by the learned Judge.

If this were an attempt to force a road through a resisting owner's land solely on the alleged authority of the proceedings of the Quarter Sessions under the old statute, depending solely on the strict legality of such proceedings, the plaintiff here would probably be entitled to succeed.

In dealing with the fact of a road shewn to have been more or less used as such for nearly sixty years, and on which statute labour has in various parts been done, I think, in endeavouring to shew its origin and the facts under which it is said to have been inaugurated, and to which its very existence as an highway is owing, we may allow some latitude in the mode of proof. The course of dealing with it as a road, and the light in which it seems to have been treated and regarded by two generations, and by the owners of the properties through which it passes,

Judgment. are fully set forth in the findings of fact of the trial
HAGARTY, Judge.
C.J.O.

He ultimately decided in favour of the plaintiff and against the legality of the highway claimed by the defendant, on the absence of proof of any petition of twelve freeholders, and of an order of the Quarter Sessions for the opening of the road.

He held there was evidence of the appointment of Mr. Rose as surveyor of highways; that such report was submitted to the Sessions; that there was no opposition, and that it was confirmed.

The evidence seems to be very strong that the origin of the road was the action of Rose the surveyor, making his report to the Sessions and their approval of it, and whether a formal order was or was not actually made, that he proceeded to set out and establish it.

This was in 1834. One witness, who accompanied Rose, swore that he said he had an order from the Sessions, and required the witness to come with him to lay it out.

At first it was marked out by blazes. It is not very clear how soon it was fully cut out—apparently soon after.

The evidence is strong that all that Rose did was with the full knowledge and apparent consent of the owners of the territory, especially of the Allens, the owners of most of the lots.

It seems clear from the evidence of the only surviving member of the council, that there was no idea of permanently closing the road; that they thought as they had Walters' bond there would be no difficulty, and they adopted the shortest words possible.

It seems impossible to believe that at that time there was any doubt or question as to there being a road in existence. Walters puts his application solely as a matter of convenience to himself, and in no way asserting any right.

We find this plaintiff in 1881 executing a deed to Her Majesty of a piece of ground at Point Traverse for the erection of a lighthouse, with "a right of way up to the public road," at the point where his gate was erected.

I cannot believe that in a case like this, that the inability to prove the petition and formal order of the Sessions, can destroy this road and leave the defendant in the position of a mere trespasser.

Judgment.

HAGARTY,
C.J.O.

I think the evidence of user by the public was very cogent. Great fluctuations were proved in the stream of travel to and from Point Traverse. For some years it was large when the Point had a more prosperous business and traffic than of late. There was a mill, wharf, etc.

The proof of statute labour having been performed for many years on many portions of the road was clear. As to the part crossed by the gate, in the emphatic language of the trial Judge, "it was performed after the gate was erected on the east and west sides of the gate by the same gang of men under the same foreman or path-master, and without regard to any differences in title or ownership, or right of user of the road as thus divided by the gate."

It was urged that the road in some places varied some rods from Rose's original line, but we may accept the learned Judge's finding that "the highway now in dispute substantially agrees with the original road."

The judgment below treats the defendant as a trespasser. It is a singular result as to a road opened nearly sixty years ago, and, as far as we can judge, professing so to be opened under the authority of the Quarter Sessions, by the regular surveyor of highways, whose report to the Sessions was clearly confirmed and approved of by the Court. So opened with the apparent knowledge and assent of the then owners; used as a road for some twenty-six years down to 1860; then described and treated as an existing road by the council and Walters, the plaintiff's predecessor in title, and the public right thereto admitted in his bond; the expenditure of township money on many occasions; a continued user, and finally the present plaintiff in a grant of land at the Point, affects to grant a right of way there; up to what he calls and admits to be a public road where he had erected his gate.

I think we must allow the appeal.

Judgment. OSLER, J. A. :—

OSLER,
J.A.

The evidence, I think, shews very satisfactorily and clearly that the road contended for was laid out and opened many years ago with the assent of the owner of the property through which it runs, and that statute labour was done upon it in like manner with his knowledge and approval.

The case does not depend altogether upon its having been laid out and opened by the authority of the Quarter Sessions under 50 Geo. III. ch. 1, though the evidence of what was done by the Sessions in 1834, and the surveyor appointed by them, is very important as accounting for the road having been laid out and subsequently opened. No doubt the road as it now exists, and as it was finally opened and laid out, does not follow very exactly throughout its whole course the line which was laid out by surveyor Rose, but it was intended as an adoption of that road, and as being, so far as it varies from the line thereof, a mere straightening of the course. It was laid out and opened in its present course before 1853, the owner being present and assenting to its being done, and it must be regarded as being substantially the road reported by Rose to the Quarter Sessions in 1834. That it existed up to the gate spoken of in the evidence, is not denied, and that being so, it seems to follow almost as of course that it exists also east of the gate, which was put up for the temporary convenience of the person who erected it with the consent of the council, and upon his undertaking to remove it when the road was required to be again opened for public travel. The very same acts which constituted the road a public road up to the gate, are evidence to shew that it was also one east of that point. I mean the expenditure of statute labour, survey, assent of the landowner, etc.; and no by-law closing it and terminating the rights of the public, was ever legally passed by the council. The findings of my brother Rose support a road by dedication, and I should be disposed to say that

there was evidence also of its having been duly established by the Quarter Sessions. The technical proof of the necessary order of Sessions following the report of the surveyor is perhaps wanting, but there is evidence from which it may well be inferred that such an order was at one time actually in existence, and the proved facts invoke the application of the maxim *omnia ritè, etc.* For these reasons I am, with all respect, of opinion that the appeal should be allowed and the action dismissed.

Judgment.

 OSLER,
J.A.

MACLENNAN, J. A.:—

I agree in the judgment and the reasons therefor of the Chief Justice. Having also come to the same conclusion on what I think to be the proper construction of the statute 50 Geo. III. ch. 1, I think I ought to express my opinion on that point also.

The records of the Quarter Sessions which escaped destruction by fire shew the appointment of a surveyor, Mr. Rose, as authorized by the statute; and also shew that a report was made by him and considered and confirmed by the justices at the proper Court in that behalf in July, 1834. The records also shew the bearings and limits of a road substantially identical with the road in question. Now this judicial act is just such an act as is authorized by the statute, if we suppose that Rose was put in motion by a petition from twelve freeholders. If there was no petition, then the act was wholly unauthorized and void, and the case is, therefore, within the maxim, "*Omnia præsumuntur ritè esse acta,*" and we must presume that not only the Court of Quarter Sessions, but the surveyor Rose, did what they did, not out of mere caprice and without legal warrant, but in the manner prescribed and by the authority conferred by law. A stronger case for the application of the maxim can hardly be imagined, more especially when it is proved, apart from the records, that the road was laid out at that time and was used as such by the public from that time until

Judgment, the year 1860; and when it is also considered that
MAOLENNAN, otherwise the surveyor and those who assisted him, as well
J.A. as those who used the road afterwards were all trespassers: Broom's Legal Maxims, 6th ed., p. 902 *et seq.*; Taylor's Law of Evidence, 8th ed., p. 163 *et seq.* and p. 1844.

If then we assume that everything was regularly done down to and inclusive of the confirmation of the report by the Quarter Sessions, the question arises whether anything further was required to constitute the road a public highway. It was contended by the respondent that the statute required the Court, not merely to confirm the report, but to direct the road to be opened; and that no such direction having been made or given, it never became in law a public highway. For this proposition, *Re Lawrence and Thurlow*, 33 U. C. R. 223, was cited, and in a dictum in the judgment of Morrison, J., who delivered the judgment of the Court, at page 229, it is suggested, but without reasons, that a minute merely allowing the report without directing or ordering that the road should be opened would not be sufficient to establish it as a highway. Even if that were an express adjudication on the point, it would, while entitled to the greatest respect, not be binding on this Court, but it is very far from being an adjudication, and as a dictum, I think, with great respect, it cannot be maintained. I think that is very plain when the several sections of the Act and the language employed by the Legislature are considered. Section 12 declares that "all roads laid out by virtue of any Act of the Parliament of this Province, * * shall be deemed common and public highways." The title of the Act is, "An Act to provide for the laying out, amending and keeping in repair the Public Highways," etc. By section 2, the justices in Quarter Sessions are authorized to appoint a surveyor or surveyors of highways "to lay out and regulate the highways and roads." By section 3, the application of the freeholders is to state in one of its alternatives, that "it is necessary to open a new high-

way or road," and the surveyor is required to examine the same, and report thereon in writing, describing particularly "the new highway or road to be opened," giving notice in writing by affixing a copy in two public places near where the new highway or road is intended "to be opened." The section then goes on to say that if no opposition shall be made to such report, "it shall and may be lawful for the said justices, * * and they are hereby required, to confirm the said report, and to direct such alteration to be made, or such new highway or road to be opened accordingly." The same section then goes on to provide for what shall be done in case of opposition to the report. In that case a jury is to be empaneled, who, after hearing evidence touching the intended new highway or road, "shall, upon their oath, either confirm or annul the said report, or alter or modify the same, * * and their verdict shall be final, and the said justices shall direct such highway or road to be altered or opened accordingly. And such highway or road so altered or opened, shall be and is hereby declared to be a common and public highway." It is then enacted that the report as confirmed or altered shall remain as a record and description of the highway or road in the office of the clerk of the peace; and a copy shall be entered in a book to be by him kept for the purpose. Now the question is, what is the meaning of "opening a road," as the phrase is used in this statute? Does it mean laying it out on the ground by survey in the usual manner, and declaring that as so laid out it is a public highway; or does it mean something more, namely, clearing the ground of the forest or other obstructions, so as to make it more or less fit for actual use? I think it is plain that it is used in the first of these senses only, and that "laying out" and "opening out," are used in an equivalent sense.

To understand what was meant, the condition of the Province in the year 1810, when the Act was passed, must be borne in mind. At that time the greatest part of it was covered by the original forest. The allowances for

Judgment.

 MACLENNAN,
J.A.

Judgment. roads made by the Crown surveyors were declared to be
MACLENNAN, highways, without any work being done upon them, and
J.A. the only means for fitting them, or any other roads, for actual use, was by the statute labour of the inhabitants, and small annual grants made by the general government for that purpose. This very statute, by section 16, provides that the roads and highways in and through every township, etc., shall be cleared, repaired and maintained by the inhabitants by statute labour; and the sum granted by the general government for making and repairing roads and bridges throughout the whole Province, was for the year 1809, £1,000, and for the year 1810, £2,000. See 49 Geo. III. ch. 9, and 50 Geo. III. ch. 2. Therefore the new roads to be laid out under this Act, would, as a rule, be through the forest, and the only provision for opening them, in the sense of clearing, was by the statute labour of the inhabitants as provided by section 16 and subsequent sections under the direction of the overseers. We know that it was only by degrees that the roads were opened up; first a mere path, then a winter road; afterwards the trees cut down, the stumps remaining, and finally the stumps removed and the road graded; the whole proceeding taking a number of years. Now, when we look at the language of the Act, we find that in the title, in the preamble, and in all the sections but one, the phrase used for the legal establishment of a road as a highway, is "laying out." See sections 2, 4, 9, 12 and 35. The exception is section 3, and in that section the phrase is "open" or "opened," and it is used many times, while the other phrase is not used at all. It is evident, however, that the same thing is meant by both phrases, and the difference has probably arisen from section 3 having been penned by a different draughtsman. If we construe "opening" to mean something different from "laying out," that is, removing timber, etc., and making it fit for travel, a road would not become a legal highway until after the work was done, for the language of the Act is, "such highway or road so opened, shall be, and is hereby declared to be a common and public highway." Until it

became a highway, however, there was no provision for doing any work upon it. Section 16 provides that the roads shall be cleared, repaired and maintained by the inhabitants under the direction of overseers by statute labour; and there is no power given to the Quarter Sessions either to provide labour or to expend money for opening a road. If it was intended that the justices should open the road in the second sense, some provision would have been made for doing the work and paying for it, which the Act does not do.

Judgment.
MACLENNAN,
J.A.

If then what the justices are ordered to do is merely to declare that the road laid out and reported by the surveyor is a highway, and in that sense is opened, that is in effect done when they confirm the report of the surveyor, or when it is confirmed by a jury summoned by them for the purpose. They have no further option in the matter; in the one case, "they are hereby required to confirm the said report, and to direct such new highway or road to be opened," and in the other, "they shall direct such highway or road to be opened accordingly."

I think it is very clear, looking at the whole Act, that it was the intention of the Legislature that, when the report of the surveyor was confirmed either by the justices themselves in the absence of opposition, or by the verdict of a jury in case of opposition, the road laid out by the surveyor and described in his report, should from that time be in law a public highway. This intention is not only expressed clearly and strongly in section 12, but also in section 35, which declares that when a road is *laid out* under the provisions of the Act, the soil and freehold thereof should be vested in His Majesty.

I am, therefore, of opinion that the road here in dispute was and is a public highway, and that the appeal should be allowed and the action dismissed.

BURTON, J. A.:—

I also think that the appeal must be allowed.

Appeal allowed with costs.

IN RE TRACY, SCULLY V. TRACY.

Mortgage—Payment—Solicitor—Authority of.

The onus of shewing that a solicitor who is in possession of a mortgage and collects the interest has authority also to collect the principal, is upon the mortgagor, and unless this onus is clearly discharged, the mortgagor and not the mortgagee must bear the loss arising from the solicitor's misappropriation of the funds.
Judgment of ROBERTSON, J., reversed.

Statement. THIS was an appeal from the judgment of ROBERTSON, J., reversing the finding of Mr. G. H. Hopkins, special referee, in favour of a claim by mortgagees, in a proceeding for the administration of the estate of the mortgagor.

The following statement of the facts is taken from the opinion of the learned referee:—

Andrew and Jane Robertson, executors of Thomas Robertson, claim to be encumbrancers upon the lands of the testator under a mortgage made by the testator in their favour, dated 4th April, 1878, for \$300, payable in five years, with interest at nine per cent., payable yearly. There is no dispute as to the mortgage, which is admitted, and also that the money was advanced. But the executors and the heirs and devisees of the testator claim that the mortgage has been paid in full. There is no question but that the money was paid on the 21st March, 1883, to one Arthur O'Leary, a solicitor, who has since absconded: and the question is who is to bear the loss occasioned by the defalcation. The loan was originally made through O'Leary, who acted for both parties. Tracy applied to O'Leary for a loan, and he spoke to Robertson, who agreed to advance the money; and Robertson, so far as I learn, never saw Tracy in the matter, either at the time the loan was negotiated in April, 1878, or at any time after. Tracy paid the interest for the first four years to O'Leary, who paid it to Robertson,—receipts for the payments on the mortgage for at least the second, third, and fourth years' interest being in his handwriting—the receipt for first

year's interest being in O'Leary's handwriting. Robertson Statement. says (and I think he is a truthful witness and gave his evidence honestly so far as his memory went) that the mortgage was in his possession when the payments of interest endorsed were made, and that after Arthur O'Leary said to him that Mrs. Tracy preferred it being in his possession so that he might endorse the interest when she would pay it, and that he gave it to him, just when does not appear, and O'Leary continued to pay Robertson the interest down to April, 1891, the interest being reduced to seven per cent. by verbal agreement with O'Leary, who, Robertson says, told him that Mrs. Tracy said she was not willing to pay nine per cent., and would pay it off unless reduced to seven per cent., and he consented. When this arrangement was made is not shewn, but the interest for 1885 was paid at seven per cent. It appears, however, that the testator Tracy being ill at the time made an arrangement with one John Lucas to give him an assignment of four years' rent of the farm for \$300 to enable him to pay the mortgage. Tracy gave Lucas the following letter, with \$30, to take to O'Leary and pay the mortgage:—

“ Downeyville, March 20th, 1883.

Mr. Arthur O'Leary.

DEAR SIR,—Please discharge the mortgage Robertson holds against me. Mr. John Lucas will pay you the money and also transfer the lease that you hold against Burk to Mr. Lucas, as he is to receive the rent for four years, and also I want to hold myself responsible to Mr. Lucas in case he may be cheated out of the rent that I will be held responsible for whatever portion he may lose.

MICHAEL TRACY.”

Lucas took the letter to O'Leary and paid him \$300 of his own money, and the \$30 given him by Tracy—in all \$330—and received back 50 cents and the following receipt:—

March 21st, 1883.

Received from Mr. M. Tracy, per John Lucas, the sum of

Statement. three hundred and twenty-seven dollars, principal \$300, interest \$27, mortgage to Robertson.

O'LEARY & O'LEARY.

The balance, \$2.50, Lucas says, was for expenses. I have no doubt being \$2 for drawing discharge, and 50 cents registration fees, and the question is, had O'Leary authority to receive the money as agent for Robertson, and if so, did he receive it as such agent? The authorities are very clear that a solicitor as such has no authority to receive the principal money on a mortgage belonging to his client; that possession of the mortgage does not give him the right; and that authority to collect the interest (as there is no doubt O'Leary had in this case) does not authorize the collection of the principal: See *Gillen v. Roman Catholic Episcopal Corporation*, 7 O. R. 146. The onus is then upon the executors and devisees to prove that O'Leary had authority, and this their counsel very ably contended that they had established, both directly and inferentially.

Mrs. Robertson, one of the claimants, said, in cross-examination: "When people came to pay off a mortgage they would come to O'Leary; he had the right to get the principal and interest; this went on all the seventeen years; we had a good many small loans; O'Leary & O'Leary always loaned the money and collected it. The money was left with O'Leary until another place was got for it. It was O'Leary who arranged this loan to the Tracys; I can't say whether he, O'Leary, had the money on hand at the time the loan was made. If he had, he had the right to let it go, and if the mortgage was paid off he had the right to take the principal money again. Everything that O'Leary did in taking money was all right, he had full authority to do it." This, I suppose, was her idea of matters; and if it stood alone and she was the sole mortgagee would end the matter. But she is an old lady unused to business, and gave her answers in answer to leading questions, and she said in her examination that her son Andrew, her co-mortgagee, does all her business and she knew nothing about it; and on re-examination:

"I gave Mr. O'Leary no authority myself in regard to these moneys, my son, I suppose, gave it to him ; this is all I know about it ; I do not know myself of any money left with him until he would get a place for it. I never gave O'Leary any instructions about the receipt of any moneys during the whole seventeen years. I did no business with O'Leary in regard to estate matters." Statement.

The son Andrew swears positively that he gave O'Leary no authority to receive the principal, and that he had no such authority—besides which I am satisfied from the evidence that Andrew received the principal moneys from time to time, and deposited them in the bank, and that they were not left with O'Leary. Andrew deposited them in his own name which may account for Mrs. Robertson supposing they were left with O'Leary between the time of repayment and reinvestment. She was also mistaken in her evidence in another matter, as she said that the moneys advanced on the mortgage were her own personal moneys in which she is clearly wrong. I mention this to shew that her ideas of the matter are not to be relied upon, and I do not think under the circumstances that I can hold from her statement that O'Leary had authority to receive the principal ; and in any case I have considerable doubt if one trustee under the circumstance could give authority to receive the principal money without the consent of his co-trustee. This was not a mortgage given to the testator, but taken to Jane and Andrew Robertson, and although called executors in the mortgage it was really to them as trustees of the estate. I have not overlooked that her idea of how matters were managed is a circumstance to be considered in weighing the other evidence in the matter.

It is also contended that Andrew Robertson's evidence and course of dealings with O'Leary shews that he had authority to collect the principal money ; but after giving the matter the best consideration, and going carefully over Robertson's books I cannot find he had authority. The books are very badly kept, but I can find nothing in them

Statement. shewing that O'Leary was in the habit of receiving principal money. True, he was their general solicitor, and they had many mortgages extending over a number of years, and they were always paid off and discharged in O'Leary's office. Robertson denies that O'Leary had authority to receive the principal money, and says that he does not know of a case of the estate moneys in which he got the principal without having previously told him. He does not deny that O'Leary sometimes got the principal for them. What he says is that O'Leary would tell him a certain mortgage was to be paid off at a certain time, and he would instruct him if he was not there to take the money for him and deposit to his, Robertson's, credit in the bank, and that this was done in several cases. He also admits that he told some parties themselves, who told him they were going to pay off, to pay it to O'Leary if he was not there, but whether a discharge was ever given O'Leary in these cases before the payment does not appear. Robertson says he has no accounts from O'Leary, and, it appears to me, this shews clearly that O'Leary had not and did not receive principal moneys generally, but only in particular cases in which it was paid into the bank to Robertson's credit or accounted for at once. There is no evidence that O'Leary ever received authority to receive the Tracy money; and the question is, does the giving to O'Leary authority in several other cases give him a general authority. One case alone clearly would not, and why should several special authorities to receive in particular cases do so, unless of course it became a general course of dealing, which was not proved in this case. If it had been shewn that Tracy knew that O'Leary had on several occasions received principal money, they might possibly be held that by their course of dealing they had held him out as agent to receive and so be stopped; but there is nothing to shew that Tracy ever knew that O'Leary received any principal money in any other case. One Donoghue was called to shew that O'Leary had authority to receive principal money. This was not a mortgage to

the estate but one to Robertson as guardian for his brothers and sisters in another matter, and clearly is a special case, the principal being payable in instalments to suit the children coming of age, and Donoghue says the arrangement was made when the mortgage was given, for his convenience. Robertson says he does not remember the matter at all; but I do not see how giving O'Leary authority to receive the instalment of principal on a mortgage by special request of the mortgagor can be considered evidence of a general authority. So I must come to the conclusion that O'Leary had not authority from the Robertsons to receive the principal money; but even if he had, I do not think it was paid to him as Robertson's agent, but rather as Tracy's solicitor. The receipt given is non-committal and does not shew on whose behalf he received it; but I think the letter and the fact of paying O'Leary the costs of the discharge and registration, shews that he had some duties to perform on behalf of Tracy. If the money had been paid to O'Leary as Robertson's agent, Robertson would have been entitled to get it from his agent without executing a discharge, but I do not think he could have done so, and if he had insisted on this position and sued O'Leary as his agent for the money, O'Leary could have successfully defended. Again, if O'Leary had handed over the money to Robertson without getting a discharge, and Tracy had afterwards been put to trouble and expense in getting one, I think O'Leary would have been liable in an action for negligence. And if I am right in holding this money came into O'Leary's hands as Tracy's solicitor, I can find nothing that ever changed the character in which he received it: See *Donaldson v. Haldane*, 7 Cl. & F. 762. I have not overlooked the contention that when one of two innocent parties must suffer, he who put it into the power of the party to commit the fraud must suffer. In *Gordon v. James*, 30 Ch. D. 249, it was held that when two mortgagees executed an assignment of a mortgage which they entrusted to a solicitor whereby he was enabled to represent to the assignee that he had paid over

Statement. the purchase money for the mortgage, that they must suffer the loss. Now, in this case the giving of the mortgage to O'Leary no doubt enabled him to perpetrate the fraud. There is no evidence to shew when Tracy got it, but I am inclined to think that it was given to Lucas when he paid the money, although he does not remember it. If paid after, the case would be much stronger; but the authorities are very clear that possession of a mortgage does not authorize the receipt of the money, and it appears to me that if I were to hold, that by Robertson letting O'Leary have possession of the mortgage, he was enabled to perpetrate the fraud, and that Robertson must therefore suffer, I might as well hold at once that possession of the mortgage authorized the receipt of the money. There is no doubt Robertson acted in a very negligent careless way in letting O'Leary have possession of the mortgage, and just when it was coming due, and letting it run ten years without making any enquiry about it, and arranging with O'Leary for a reduction of interest without any written agreement with or even seeing Tracy; and while I cannot give effect to it in deciding who shall suffer the loss, I think it is a matter to be taken into consideration in deciding the question of costs, as the whole trouble has been occasioned by O'Leary (who was Robertson's solicitor in this respect) fraudulently and improperly giving up possession of his client's mortgage, and Robertson is not now in a position to give up his security upon payment of the money to him, and these proceedings being in the nature of redemption proceedings I doubt if they are entitled to costs.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 22nd of May, 1894.

Watson, Q. C., for the appellants.

W. H. Blake, for the respondents.

June 30th, 1894. HAGARTY, C. J. O.:—

Judgment.

HAGARTY,
C. J. O.

A close examination of the evidence forces me to the conclusion that we must allow the appeal and restore the finding of the referee. I think no authority is proved against the mortgagees that they had authorized O'Leary, their solicitor, to receive payment of principal moneys, and his possession of the mortgage and receipts from time to time of the interest cannot prove such authority.

It is a very common practice with investors to leave the security with the solicitor, and as much for the convenience of the borrower as the lender to allow interest to be received by the holder of the security.

The manner in which the money was paid to O'Leary, and the unexplained neglect of the payee to obtain either a discharge or assignment, supports the argument that Tracy, as it were, retained O'Leary to transact the affair. Tracy, the mortgagor, sent one Lucas with money to pay O'Leary, with this letter: [reading it.]

The mortgage, it seems, was brought back to Tracy and was found with his other papers at his death. No attempt seems to have been made by him to obtain a legal discharge.

He chose to pay the money to the solicitor on his bare receipt, asking for no legal release of the land. Had he insisted thereon, as a man naturally would do, the fraud could hardly have been committed. Interest continued to be paid to the mortgagees up to 1891, years after the alleged payment.

On the ordinary rule as to two innocent persons suffering by the fraud of the third, the scale is generally turned against him, who, by his conduct, enabled the third person to defraud.

Here the mortgagor simply pays the money, omitting wholly to discharge the land. We may presume he expected the land to be discharged, but we cannot understand how this could be done except by O'Leary obtaining the discharge from the Robertsons. As the referee, in his very careful judgment, suggests, the mortgagor Tracy

Judgment.

HAGARTY,
C.J.O.

might properly have looked to O'Leary for his neglect in not doing what Tracy would expect him to do for him.

I can see no evidence of any direct authority to O'Leary to bind Robertson by his receipt of the money, and the case equally fails to shew any general authority to receive principal moneys, so as to make the payment equivalent to payment to the mortgagees.

I think the cases cited in argument clearly shew that we must allow the appeal.

The evidence of O'Donoghue in a wholly different dealing should not avail to help the respondents.

OSLER, J. A. :—

The facts of the case are very fully and fairly set out in the written judgment of the learned referee Mr. Hopkins, and hardly as it may bear upon the mortgagor's estate, I think the result he arrived at was right, and that the judgment of Mr. Justice Robertson allowing the appeal from his report was wrong, and ought to be reversed.

The sole question is whether the mortgagor's solicitor, O'Leary, in whose possession the mortgage was, and who was undoubtedly authorized to collect the interest from the mortgagor Tracy, had authority also to receive payment of the principal. The onus of proving this lay on the mortgagor. It can hardly be necessary to refer to the cases to shew that the mere possession of the mortgage by O'Leary, the solicitor of the mortgagor, conferred upon him no implied authority to receive the principal money. Had the discharge of mortgage been also entrusted to him the case would have presented a very different aspect. *Gillen v. Roman Catholic Episcopal Corporation*, 7 O. R. 146, and *Gordon v. James*, 30 Ch. D. 249, may be noticed, where the principal authorities are collected.

The evidence, in my opinion, fails to shew O'Leary's authority. I think the referee rightly understood and dealt with expressions which might lead to a contrary inference in the evidence of Mrs. Robertson, and I am unable

to see how the evidence of O'Donoghue, another mortgagor of Robertson, which is relied upon by the learned Judge, can be of any force whatever in proving that the solicitor had authority to receive the principal of Tracy's mortgage. It leans in the contrary direction, and, indeed, shews that Donoghue made his payments to O'Leary in consequence of an arrangement specially made with Robertson in O'Leary's office when the mortgage was being drawn. Two other circumstances are also strongly opposed to the respondents' contention: the first is that the letter of the 20th March, 1883, from Tracy to O'Leary, conveyed to him by Lucas when the principal was paid, is a letter to him rather in the character of his own solicitor than of Robertson's agent; and, secondly, that the money was paid and the mortgage given up to the mortgagor's agent Lucas two weeks before the mortgage was due, and therefore at a time when O'Leary had certainly no right to receive it for Robertson, and could only receive it in the character of agent for the mortgagor to pay it to the mortgagee when it should become due. There is no evidence that it afterwards came to the latter's notice that O'Leary had received it, or that the capacity in which he held it had in any way been altered. The arrangement subsequently made by O'Leary with Robertson for an extension of time and reduction of the interest was made by him for his own benefit though professing to act as the mortgagor's agent, and necessarily upon the assumption by Robertson that the mortgage had not been paid, as the fact of payment would of course be concealed by O'Leary in order to cover his fraud.

It is somewhat singular that neither Tracy nor his executors discovered that the mortgage had not been discharged until these proceedings were taken to collect it; and that the gentleman who was partner of O'Leary when he received the money and while he was in the habit of doing business for the appellants was not called by the respondents to give evidence, if he could give any, in support of their contention that he was authorized to receive the principal of investments made by him for the appellants.

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

We were informed on the argument that the name of the solicitor whose misconduct has led to this litigation is still on the Solicitors' Roll. Possibly the facts have not been brought to the attention of the Law Society. If not, they ought to be, in order that, whether O'Leary has or has not left the country, his name may be struck off the roll.

The judgment appealed from, of the reasons for which we have but a very meagre and unsatisfactory report, which probably does not do justice to the learned Judge, must be reversed, and the appeal from the report of the referee dismissed.

MACLENNAN, J. A. :—

The question in this appeal is between the plaintiffs, representatives of a mortgagor, and the defendants, mortgagees, and is whether the defendants are bound by a payment of the principal money of the mortgage debt made by the mortgagor to Messrs. O'Leary & O'Leary, a firm of solicitors, but which the solicitors never paid over to the defendants. The referee decided the point in favour of the defendants, but was reversed by Mr. Justice Robertson.

The payment was made on the 20th March, 1883, but the mortgage was not due until the 4th of April following. It is not contended that the solicitors had any express authority; but it was not disputed that an authority to receive the interest was to be inferred from the course of dealing. What has to be made out here, however, is that they had authority not only to receive the principal money but also to receive it before it was due. I am of opinion that it would require the clearest evidence of express authority to bind a client by a payment of principal money to his solicitor before it was due, and I do not think such authority could properly be inferred from any ordinary course of dealing between them. It is not pretended that the solicitors had authority to execute a discharge of the mortgage.

That had to be signed by the defendants, and until they received the money they could not be expected or compelled to give a discharge. While there is nothing to prevent a mortgagee from authorizing another person to receive the mortgage debt, although he is not also authorized to discharge the mortgage or to reconvey the estate; yet I think such authority ought in all cases to be proved by clear and satisfactory evidence, and ought not to be readily inferred. The solicitor of the mortgagee as such has no such authority unless he has had instructions to take proceedings for its collection, in which case, of course, it may safely be paid to him: Cordery on Solicitors, 2nd ed., p. 90, and cases cited. In the present case the mortgagor sent the money by a messenger, one Lucas, with a letter addressed to one of the solicitors, in which he said: "Please discharge the mortgage Robertson holds against me. Mr. John Lucas will pay you the money." The rest of the letter related to business which did not concern the mortgagee in any way, which he requested the solicitor to do for him. Mr. Lucas paid the money to the solicitors, and obtained a receipt in this form: [reading it.]

Judgment.
MACLENNAN,
J.A.

The solicitors paid the interest to the defendants, but not the principal; and they continued to pay the interest until the 4th of April, 1891, after which no more was paid. During all these eight years no application was made to the defendants for a discharge of the mortgage, or for a reconveyance of the estate; and they were wholly ignorant during all that time that the principal money had been paid to the solicitors.

I am clearly of opinion that there is no sufficient evidence, indeed, I should say no evidence at all of any authority to receive the principal money on behalf of the defendants at the time it was paid; and that under the circumstances the proper legal effect of the payment and receipt of the money was that it was paid to and received by Messrs. O'Leary & O'Leary as the solicitors and agents of the mortgagor, and that it never became the money of the mortgagees.

Judgment. I am, therefore, with great respect, of opinion that the
MACLENNAN, appeal should be allowed, and the report of the referee
J.A. restored.

BURTON, J. A. :—

I agree.

Appeal allowed with costs.

BROWN V. DEFOE.

Bailment—Warehouseman—Negligence—Collapse of Warehouse.

Statement. THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 24 O. R. 569, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 31st of May and 1st of June, 1894.

S. H. Blake, Q. C., H. E. Irwin, and A. C. Macdonell,
for the appellant.

Osler, Q. C., and J. E. Robertson, for the respondent.

September 11th, 1894. The majority of the Court, without dealing with the question of law, ordered a new trial, without costs here or below, being of opinion that from the answers of the jury it was not possible to say with certainty what the cause of the accident was.

Burton, J. A., was of opinion that the answers while ambiguous did not go far enough to shew any negligence on the defendant's part, and therefore that the action failed.

OSTROM V. BENJAMIN (No. 2).

County Court—Jurisdiction—Claim over \$200—Liquidated or Ascertained Amount—R. S. O. ch. 47, sec. 19, sub-sec. 2.

Whenever a sum up to \$400 is agreed on by the parties as the remuneration for a service to be performed, or as the price of any article sold, if the service be performed or the article be delivered in pursuance of the bargain, the amount may be recovered in the County Court, denial of the contract and price not availing to oust the jurisdiction.

Robb v. Murray, 16 A. R. 503, considered.

Judgment of the Queen's Bench Division affirmed.

THIS was an appeal by the plaintiff from the judgment of the Queen's Bench Division. Statement.

The action was brought to recover \$237.50 for services rendered as pension agent, and the plaintiff ultimately succeeded in establishing the claim. See 20 A. R. 336. Upon the taxation of costs the taxing master ruled that the action could have been brought in the County Court, and gave the plaintiff costs on the scale of that Court with a set-off to the defendant. This ruling was affirmed by the Master in Chambers, but he was reversed by GALT, C. J., who in turn was reversed by the Queen's Bench Division.

The plaintiff then appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 17th of April, 1894.

F. E. Hodgins, for the appellant.

A. J. Russell-Snow, for the respondent.

The following cases were cited: *Wallbridge v. Brown*, 18 U. C. R. 158; *Furnival v. Saunders*, 26 U. C. R. 119; *Watson v. Severn*, 6 A. R. 559; *Robb v. Murray*, 16 A. R. 503; *McKay v. Martin*, 21 O. R. 104; and *Brown v. Hose*, 14 P. R. 3.

Judgment. June 30th, 1894. HAGARTY, C. J. O. :—

HAGARTY,
C.J.O.

This is an important question as to the scale of costs.

The plaintiff claimed that the defendant represented to him that he was engaged in procuring a United States pension for one Mary Sweet, and that he, the defendant, was to receive from her \$500 if he succeeded in obtaining it, and in consideration that the plaintiff would give his professional services, etc., in endeavouring to procure it, the defendant agreed to pay the plaintiff \$250, half of said \$500; that the plaintiff did give such services, and the pension was obtained, but the defendant did not pay the \$250, but only \$12.50, part thereof.

The defendant denied any such agreement.

At the trial, this question was put to the jury: "Did defendant agree with plaintiff to pay him one-half of \$500 if plaintiff would assist him in obtaining the pension?" A. "Yes."

The plaintiff had a verdict for that sum, less the amount admitted to have been paid by defendant.

The Master held that the plaintiff could only recover County Court costs.

Galt, C. J., reversed this decision, and, on appeal, the Divisional Court of the Queen's Bench reversed the Chief Justice and restored the Master's finding, and now the plaintiff appeals by leave to this Court, as the point is one of much importance.

It depends wholly on the meaning to be attached to the words of the statute.

By the Revised Statutes of Ontario, ch. 47, sec. 19, the County Court shall have jurisdiction:

1st. In all personal actions where the debt, or damage claimed does not exceed the sum of \$200.

2nd. In all personal actions relating to debt, covenant, and contract to \$400, "where the amount is liquidated or ascertained by the act of the parties, or by the signature of the defendant."

I am of opinion, whenever a sum up to \$400 is agreed

on by the parties as the remuneration for a service to be rendered, or for the price of a horse or goods sold, or for any article the subject of sale or purchase, if the services be performed, or the article or goods delivered in pursuance of the bargain, that the amount can be recovered in the County Court.

Judgment.

HAGARTY,
C.J.O.

Here the jury have found the agreement, the services rendered, and the price fixed by the bargain. Therefore the amount was, as I understand, liquidated and ascertained by the act of the parties. That the defendant chose to deny his contract and refuse to admit the price fixed, cannot avail, as the jurors have found that it was so fixed and ascertained as the plaintiff has proved.

To allow a defendant's denial of the fact of liquidation and ascertainment to prevent the operation of the statute would be to destroy many provisions intended to lessen the amount of costs, and to extend the County Court jurisdiction.

The fact of the liquidation is proved by the verdict. It is an amount ascertained by the act of the parties.

If a man buy in a shop a jewel or other article at the price of \$250 agreed on between him and his vendor, and take the article, the latter may sue for the price in the County Court, if he can satisfy the judge or jury of the truth of his account of the bargain, and that in the face of the defendant's denial that he ever bought the article or ever agreed on any named price. I feel no difficulty in thus holding.

I am not prepared to agree that this liquidation or ascertainment must be equivalent to "an account stated and settled."

This generally takes place after the contracting of the debt or obligation, a kind of reckoning up between debtor and creditor of the state of accounts between them.

The judgment of this Court in *Watson v. Severn*, 6 A. R. 559, is express, that the ascertainment may be at the time of the making of the contract of sale. The late learned Chief Justice Spragge, after approving of *Wall-*

Judgment.
HAGARTY,
C.J.O.

bridge v. Brown, 18 U. C. R. 158, says, that upon proof that a definite price and a definite quantity were, at the time of the bargain, settled between them, the case would be free from doubt, and that all the requisites of the statute would be complied with.

Mr. Justice Patterson agreed, saying: "I treat the amount sued for as having been liquidated by the act of the parties by an actual settlement, the exact amount of which cannot be stated by the witness, but which was at least \$300. The question of this statement of account was left to the jury, with the express direction that the plaintiff was not entitled to recover unless the sale was made as alleged by King, and it was ascertained at the time that \$300 was the amount to be paid. If an action were brought upon an account stated, the question whether an account had been stated would be directly raised by a plea of the general issue, and would, of course, be a proper question for the jury. I cannot say that when the statement of account in this case, or the ascertainment of the amount by the act of the parties, *which I take to be another form of expression for the same thing*, became a question on which the jurisdiction of the Court depended, it was improper to leave it to the jury, or to be guided by their finding."

In that case there was no pretence of any liquidation or statement of account beyond what took place on the making of the contract.

Robb v. Murray, 16 A. R. 503, was relied on by the plaintiff. The judgment of the Court was delivered by my brother Osler. We all agreed in the decision that the facts shewed no liquidation, etc., by act of the parties. But my learned brother's language gives colour to the argument that the ascertainment or liquidation under the statute must be as to some debt "due from one party to the other on account of some debt, covenant, or contract between them."

But he says he agrees with the view of Patterson, J.A., in *Watson v. Severn*, 6 A. R. 559, whose language he

quotes. There it seems clear that Patterson, J.A., while taking the one ascertainment to be the "account stated," upholds the Court's decision that the ascertainment might be when the contract was entered into.

Judgment.

HAGARTY,
C.J.O.

I think that the appeal must be dismissed.

OSLER, J. A. :—

I was under the impression, an erroneous one as it seems, that I had expressed the judgment of the Court in *Robb v. Murray*, 16 A. R. 503. The result of the present decision is, that that case must be taken to be overruled.

MACLENNAN, J. A. :—

This is an action brought in the High Court to recover \$237.50, a balance of a sum of \$250, alleged by the plaintiff to have been agreed by the defendant to be paid by him to the plaintiff in consideration of his services in assisting to procure a pension from the United States Government for a lady named Mary Sweet. The contract was disputed by the defendant by his pleading, and also at the trial, but the jury found the issue in favour of the plaintiff, and that is now the judgment of the Court.

On the taxation of costs, it was contended that the plaintiff was only entitled to County Court costs, on the ground that the action might have been brought in that Court.

The Divisional Court of the Queen's Bench has held in accordance with that contention, and the present appeal is from that judgment.

The words of the statute R. S. O. ch. 47, sec. 19 (2), are that the County Court shall have jurisdiction "in all causes and actions relating to debt, covenant, and contract to \$400, where the amount is liquidated or ascertained by the act of the parties." What is meant by the amount? Obviously, I think the amount which the plaintiff is entitled to recover; that is the only thing to which these

Judgment.
MACLENNAN,
J.A.

words can reasonably be held to apply, and, therefore, whenever the amount to be recovered is \$400 or less, and is so ascertained and liquidated, if it be a cause or action relating to debt, covenant, or contract, the County Court has jurisdiction.

It was contended that the statute was confined to cases in which all that was necessary was to prove an account stated in respect of some debt, contract, or covenant, and was not applicable to cases in which it was necessary to prove a disputed contract, or that it was performed by the plaintiff on his part, as for example, that goods agreed to be sold were delivered; that work agreed to be done was performed, or that services agreed upon had been rendered. I think there is no warrant for that distinction. The statute does not require anything else to be ascertained by the act of the parties than the amount, that is the amount to be recovered. Everything else may be at large and may require proof in the usual way. The case of *Robb v. Murray*, 16 A. R. 503, was relied upon as deciding that the jurisdiction was confined to ordinary cases of stated accounts; but the language of the Court there must be construed with reference to the facts of the case.

It was there contended that each item of goods sold by the defendant, when put down in his sales book, and when sued for by the plaintiff, was an item liquidated and ascertained by the parties, but the Court held otherwise, pointing out that, with reference to those items, it required some acknowledgment by the defendant to the plaintiff with his assent that these items were to be paid, or an acknowledgment of a debt which would be equivalent to an account stated.

In the present case the amount which the plaintiff was to receive for his services was liquidated and ascertained by mutual agreement. It was to be \$250, no more no less, and I think the County Court, therefore, had jurisdiction.

I have examined all the cases which have been decided on this subject, and I do not think any of them warrants

the narrow construction which we are asked to put on Judgment.
the enactment in question.

MACLENNAN,
J. A.

I think that the appeal should be dismissed.

BURTON, J. A. :—

I agree.

Appeal dismissed with costs.

SHERRATT V. THE MERCHANTS BANK OF CANADA.

Husband and Wife—Gift—Chose in Action—Knowledge of Transfer.

Since the Married Women's Property Act of 1884, a husband may make a valid gift of a chose in action to his wife without the intervention of a trustee.

A gift to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of it.

Judgment of ROSE, J., affirmed.

THIS was an appeal by the defendants from the judgment Statement.
of ROSE, J.

To understand the points of law involved a brief outline only of the facts is necessary. The action was brought on the 17th of June, 1892, for payment of \$5,000 and interest from the 21st of April, 1887, the amount of a deposit receipt issued by the defendants on that day in the plaintiff's favour. The money in question belonged originally to the plaintiff's husband, and was part of a sum at his credit in the hands of the defendants. He, on the day in question, having drawn a cheque for the amount in question in favour of "bearer," handed it to the bank manager, and had the special deposit made in the plaintiff's name, the receipt being handed to him. Whether he gave the receipt to the plaintiff or not, or even told her of it, was disputed, but he shortly after had it in his

Statement. own possession and was allowed by the defendants to from time to time draw out the money. He died in September, 1889, and no claim to the money was made by the plaintiff in his lifetime, but in January, 1890, she demanded payment.

The action was tried at Perth, on the 10th of October, 1893, before ROSE, J., who found all the facts in the plaintiff's favour, and on the 20th of January, 1894, gave judgment for her.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 30th and 31st of May, 1894.

McCarthy, Q. C., and *E. G. Malloch*, for the appellants. There is no evidence whatever of any actual gift. Perhaps there was an intention to give, but no actual transfer. *Fleet v. Perrins*, L. R. 4 Q. B. 500, is often referred to in cases of this kind. But there the document was payable to the husband and was handed over without endorsement, and this was held insufficient. The Scotch cases of *Miller v. Miller*, 1 C. of S. Cas. (4th series) 1107; and *Jamieson v. McLeod*, 7 C. of S. Cas. (4th series) 1131, are more in point. These shew clearly that there is the power to change the intention, and that there must be something more than merely placing the money to the wife's credit. That may be for the purpose of protecting the money or for enabling her to deal with it as his agent. It seems to be a question of intention, and the intention must be shewn: *Marshal v. Crutwell*, L. R. 20 Eq. 328; and also the communication of the intention to the beneficiary: *Thomson v. Thomson*, 9 C. of S. Cas. (4th series) 911; *Matheson v. Mackenzie*, 7 C. of S. Cas. (3rd series) 930. In *Williams v. Everett*, 14 East 582, it was held that it was the attornment by the bank that vested the right of action in the beneficiary. See also *McCabe v. Robertson*, 18 C. P. 471; *Payne v. Marshall*, 18 O. R. 488; *O'Brien v. O'Brien*, 4 O. R. 450. Everything here is against the theory that

Argument.

there was any intention to make a gift to the wife. The matter must be regarded as if the contest had taken place in the lifetime of the husband, between his wife and himself, and at what time would she then have been able to say that the money was hers? Clearly, if the husband had retained control of the receipt and it had been found in his papers at his death the wife would have had no claim. The mere receipt is not enough: *Talbot v. Cody*, Ir. Rep. 10 Eq. 138 [1875]; *Gosling v. Gosling*, 3 Drew. 335. Assuming, however, that the fact of the deposit was communicated to the wife, the evidence is that dominion and authority were still exerted over it by him, and the intention would appear to have been simply to try to exercise a check over himself. The husband professed to act as the wife's agent, but there can be no agency without knowledge or ratification. The necessity for shewing the intention appears further from *Jones v. Lock*, L. R. 1 Ch. 25; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Heartley v. Nicholson*, L. R. 19 Eq. 233; *In re Whittaker*, *Whittaker v. Whittaker*, 21 Ch. D. 657; and *Travis v. Travis*, 12 A. R. 438. At common law, even if there was a gift, the husband had the right to resume possession, and a further question is whether the Married Women's Property Act has affected this. There is a conflict between section 3 and sub-section 4 of section 4 of that Act, R. S. O. ch. 132. Section 3 is copied from the English Act and is very wide. Sub-section 4 is not in the English Act. There would be no necessity for this sub-section unless section 3 is intended to be restricted to separate property, technically so called. But sub-section 4 makes property given by the husband still subject to his control and dominion. Section 3 has no application here at all, and therefore, the case must be looked at as if there were no statutory enactment, and without statutory help the gift could not be made by the husband to the wife without the intervention of a trustee: *In re Jupp*, *Jupp v. Buckwell*, 39 Ch. D. 148; *Butler v. Butler*, 14 Q. B. D. 831. It has been contended, however, that a man may make himself trustee for his

Argument. wife, but as pointed out in *Schaffer v. Dumble*, 5 O.R. 716, and *Milroy v. Lord*, 4 DeG. F. & J. 264, there must be an intention to do this. There is a conflict on this point, and a mode of reconciling the cases is pointed out in *Kent v. Kent*, 19 A. R. 352, viz., that if everything is done by the husband that can be done he becomes the trustee. This has not been shewn here. Then the delay and want of corroboration are fatal: *In re Finch*, *Finch v. Finch*, 23 Ch. D. 267; *Cosnahan v. Grice*, 15 Moo. P. C. 215; *Grant v. Grant*, 34 Beav. 623.

Watson, Q. C., and *J. M. Rogers*, for the respondent. Authorities are of little value in this case, which depends upon the mere question of fact whether or not a gift was made, and this question has been found in the respondent's favour. Everything points to the correctness of this finding. [The learned counsel then discussed the evidence.] *Prima facie* the wife's title was complete when the deposit was made: *Mews v. Mews*, 15 Beav. 529; *O'Brien v. O'Brien*, 4 O. R. at p. 455, and there is no evidence whatever to rebut the presumption of title. There is nothing in the contention that there was no completed gift: *Payne v. Marshall*, is one of the cases cited and it goes much further than this case. Then *Watson v. Bradshaw*, 6 A. R. 666, shews that there may be a gift of personal property without actual delivery. The intention to give and the communication of that intention to the donee is clearly enough: *Viet v. Viet*, 34 U. C. R. 104; *Winter v. Winter*, 4 L. T. N. S. 639; *Cochrane v. Moore*, 25 Q. B. D. 57; *In re Harcourt*, *Danby v. Tucker*, 31 W. R. 578; *In re Murray*, *Purdham v. Murray*, 9 A. R. 369; *Grant v. Grant*, 34 Beav. 623; *Travis v. Travis*, 12 A. R. 438. Here there was delivery both of the money and of the evidence of title. The delay is no bar: *Saderquist v. Ontario Bank*, 15 A. R. 609, nor is there anything in the point attempted to be made under the Married Woman's Act. Its effect is discussed in *O'Doherty v. Ontario Bank*, 32 C. P. 285. Before the Act, a gift might be made by husband to wife, which would be quite good in equity. The intention of

the Act was to enlarge and not to restrict. Section 3 gives the right to take a gift from the husband without the intervention of a trustee. Sub-section 4 applies only to gifts by third parties, and takes away the husband's dominion as to these. The point is also discussed in *Kent v. Kent*, 19 A. R. at p. 361 ; and see *Sweetland v. Neville*, 21 O. R. 412. Argument.

E. G. Malloch, in reply.

June 30th, 1894. OSLER, J. A. :—

Notwithstanding Mr. McCarthy's powerful argument and a subsequent perusal and reperusal of the evidence, I am unable to hold that the learned trial Judge has erred in his decision of the facts, or rather of the fact which was so strongly contested, that the plaintiff's husband had actually handed her the deposit receipt, which is the subject of this action.

It is not denied that he transferred the money from his own name to hers in the books of the bank, or that the banker gave him at his request the deposit receipt therefor in her name in the usual form. The great contest was whether he had afterwards actually handed it to her, and it was upon certain discrepancies and errors in the plaintiff's evidence that so much reliance was placed by the appellants. With one exception, these seem to me, whether taken separately or together, to be of an entirely trivial character. What has been contended for as absolutely destructive of her case is, that while the receipt bears date 21st April, 1887, and she swears with some detail that it was given to her in the kitchen of a house called the Drennan house, which she said they then lived in, it appeared that in fact they were not then living there, but had moved out long before to a house on the Bell farm.

I do not, however, attach great weight to this circumstance, especially as the plaintiff's statement seems not at first to have attracted the attention of her own counsel, and there was no re-examination in explanation on the

Judgment.
OSLER,
J.A.

point, and the difficulty suggested by it seems first to have been pressed in the argument. It was by no means unlikely that the plaintiff should have confused the one name with the other, or the place where the receipt was given to her, and I confess I think that Rose, J., impressed as he evidently was with the conviction that she was a sincere and truthful witness, has suggested a probable explanation of the mistake. Possibly an even more natural one is that the rooms in the Drennan house and the house on the Bell farm were so far alike that there was a kitchen and an upstairs bed room in both. In the former the receipt was given to her, and in the latter she kept the box or trunk in which she deposited it, whether in the one house or the other is an immaterial detail, in the recollection of which, considering the time which had elapsed when she gave her evidence, and that the change from the one house to the other took place very near the time when the receipt was procured, she might easily fall into error. The impression I have myself derived from the evidence, apart from the finding, is in favour of the plaintiff's veracity. I think the receipt really was given to her by her husband in the way she describes, and that he afterwards took it away and made use of it without her knowledge or consent; and that the defendants' manager carelessly and irregularly allowed him to deal with it as he did. To my mind, her evidence as to the possession of the receipt really receives corroboration from the incident sworn to by the bank manager of her attendance at the bank to give her signature on the stub of the book from which the receipt found had been taken. He could hardly have invented that incident, and while she may have forgotten it, as she denies it, her denial is at least honest, as it was in her interest to have admitted it, tending as it does to prove the fact that she knew of the receipt.

The delay which occurred in bringing the action is no doubt a fact to be considered in weighing the *bona fides* of the plaintiff's claim, as it suggests that she may have known of her husband's dealings with the receipt, and that she

was an assenting party. But it is by no means conclusive, and in the case of an ignorant illiterate woman, ignorant of her rights, or how to enforce them, who had been told by the defendants' manager when she went to enquire about the receipt after her husband's death that there was no receipt or money of hers in the bank, it would be unsafe to press the fact of delay too far, particularly when the conduct of the bank in dealing with the receipt, *prima facie* the plaintiff's property, is shewn to have been careless if not altogether irregular. It is almost incredible that the manager could have supposed that she had personally endorsed it.

Judgment.

OSLER,
J.A.

The fact then of notice of the receipt or delivery of it to the plaintiff having been proved, if that was a matter essential to be proved in the present state of the law with regard to married women, I have no difficulty in holding that there was a perfectly valid gift of the receipt from the husband to the wife. The question was considered to some extent in the cases of *O'Doherty v. Ontario Bank*, 32 C. P. 285, and *Kent v. Kent*, 19 A. R. 352, and here we are dealing with a transaction free from many of the embarrassments which existed in a former state of the law, arising out of the peculiar relation between husband and wife, as it occurred after the Married Women's Property Act of 1884 came into force.

The second section of that Act enacts that a married woman shall, in accordance with the provisions of the Act, be capable of acquiring, holding, and disposing of any real or personal property in the same manner as if she were a *feme sole*, and without the intervention of any trustee. And the 21st section interprets the word "property" as including a thing in action. A deposit receipt is, therefore, property which she may acquire and hold under the Act, and she may acquire and hold it as if she were a *feme sole*. There is no reason why she may not so acquire it from her husband as a gift, as any other person might do.

On the argument I referred to *Standing v. Bowring*, 31 Ch. D. 282 as a recent decision bearing in the plaintiff's

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OSLER,
J.A.

favour, as shewing that at all events as between persons who were not husband and wife assent to a gift by one to the other would be presumed. Lord Justice Cotton there says (p. 288): "I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, 'I will not take it.'" There the transfer was of stock into the joint names of the transferror and the donee, and it was held that the former could not revoke the gift, although the latter had no notice of it until he was requested to join in a re-transfer to the donor.

This case is approved in the subsequent cases of *London and County Banking Co. v. London and River Plate Bank*, 21 Q. B. D., at p. 542; *Re Blake, Blake v. Power*, 60 L. T. N. S. 663, and *In re Arbib and Class's Contract*, [1891] 1 Ch. at p. 613. In *Re Richardson*, 47 L. T. N. S. 514, a policy of insurance on a man's own life was taken out by him in the name of his daughter. He retained it in his hands, paid the premiums, and made no disposition of it by will. It was held that the retention of the policy did not shew that the beneficial interest was not intended to pass, and that the right of the daughter was complete. I see no reason why a wife's capacity to receive a gift from her husband is not as large as that of any one else, except so far as it may be restrained by the latter part of sub-section 4 of section 4 of the Act R. S. O. ch. 132. The sub-section enacts that a woman married since 4th May, 1859, shall hold her personal property free from the debts or control of her husband, but that this sub-section shall not extend to any property received by a married woman from her husband during coverture. We are not, in this case, dealing with an attempt by a creditor of the husband to reach the property which is the subject of the gift, and the clause cannot operate here to defeat the wife's claim.

The Act is an enabling Act, and even if the clause is to be taken as controlling the former section (section 3 of the

Revised Act), I should be of opinion that it did not abrogate the equitable doctrine by which a husband was permitted to declare himself a trustee of his property for the benefit of his wife. The law in that respect has not been altered by the Act, which can merely be said not to have been extended to such a case.

Judgment.

OSLER,
J. A.

It is remarkable that at the time the deposit receipt in question was given, this enactment, which had formed part of section 5 of R. S. O. [1877] ch. 125, had, as was pointed out in *Moore v. Jackson*, 19 A. R. 383, been repealed by the Act of 1884, and it did not appear again until the Revised Statutes of 1887 came into force, when it was inserted as part of section 4 of the Married Women's Property Act, ch. 132, by authority of 50 Vic. ch. 7, sec. 21 (O.). This is, perhaps, a sufficient answer to the argument which the defendants built upon the clause, though I am not sure that the Supreme Court, on the appeal in *Moore v. Jackson*, treated the Act of 1884 as having repealed the provisions which now appear as section 4 of the Revised Act.

I think we should dismiss the appeal.

MACLENNAN, J. A. :—

In their argument before us, and also in the Court below, counsel for the defendants relied very much on sub-section 4 of section 4 of the Married Women's Property Act, R. S. O. ch. 132, as excluding the plaintiff from the benefit of the Act, by reason of the exception at the end of that sub-section, declaring that it should "not extend to any property received by a married woman from her husband during coverture." I should not have thought the clause had the effect contended for, even if it had been available to the appellants; but it is not necessary to consider its effect at all, for the reason that it was not in force on the 21st April, 1887, when the transaction in question occurred. It had been enacted originally in 1859, but was repealed in 1884, by the Act 47 Vic. ch. 19, sec. 22 (O.), and remained repealed until the 31st December, 1887, when it was re-enacted in R. S. O. ch. 132.

Judgment.

MACLENNAN,
J.A.

The deposit made by the plaintiff's husband is, therefore, governed by the Act of 1884, just mentioned; section 1 declares that a married woman shall be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property, as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee; and by section 1, sub-section 2, she is made capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and suing and being sued, etc. in all respects as if she were a *feme sole*; and by section 21 it is declared that the word "property" in the Act, includes a thing in action.

At common law, the husband, in order to make a gift of this money to his wife by means of a deposit, must either have deposited it in his own name, or in the name of some other person in trust for her; or must have got the bank to express in the deposit receipt or otherwise, that they held the money in trust for her. The effect of the statute is to dispense with the necessity of a trustee, and to enable the wife herself to take and hold the gift in her own name, just as if she were not married at all. The sections of the Act which I have above quoted, are substantially identical with the corresponding sections of the Imperial Act of 1882, the effect of which is illustrated by the recent case of *Ramsay v. Margrett*, [1894] 2 Q. B. 18, where a verbal sale by husband to wife of household furniture, in the house in which they were both living, was upheld, without any formal delivery; and the Court of Appeal decided that under the circumstances the change of property by the sale effected a change of possession.

That was a case of chattels; the present is a case of a chose in action, but the statute expressly declares that the word "property" extends to a thing in action. The husband's money standing at his credit in the bank was a chose in action, and it was assigned in the way such property is assigned every day. He drew his cheque for \$5,000 payable to bearer, and presented it to the bank

for deposit to the credit of his wife. That was done. It was charged to him and credited to her, and the assignment was complete. The bank had become debtor to the plaintiff for the \$5,000, and their debt to her husband had been reduced by a corresponding amount. Not only did the bank become debtor to the plaintiff by entry in their books, but they issued the deposit receipt in question, acknowledging that it was her money they had received, and that she was the person to whom they held themselves accountable.

Judgment.

MACLENNAN,
J. A.

The statute having qualified the plaintiff to receive this property, I think the legal and also the beneficial property in the chose in action passed to her as effectually as if she were a *feme sole*.

It was contended, however, that even if the legal title passed to the plaintiff, there was a resulting trust in favour of the husband. But even if the dictum of the late Sir George Jessel, M. R., in *Fowkes v. Pascoe*, L. R. 10 Ch. 343, were held to be good law, that a trust results from a transfer of shares or stock, the same as from a purchase in the name of another person, yet the present transfer being from husband to his wife, is *prima facie* a gift or advancement, and not a trust for the donor: *Dyer v. Dyer*, 1 W. & T. L. C. 6th ed., at p. 255; and there is no evidence that anything but a gift was intended, but the contrary.

It was also strongly urged that the gift was ineffectual and incomplete for want of notice; and could be and was revoked before notice; and it was contended that the plaintiff's evidence that the receipt had been delivered to her and had been in her possession for a long time, and had been taken from her box by her husband without her knowledge, was not to be believed, because of discrepancies and contradictions in her evidence.

The learned trial Judge, after the fullest consideration, does not think she ought to be discredited on that account, and I think it is impossible for us to say he is wrong. But even if we did, I think notice or delivery of the deposit receipt was clearly unnecessary to complete the gift. This

Judgment. was decided by the Court of Appeal after full consideration, in *Standing v. Bowring*, 31 Ch. D. 282.

MACLENNAN,
J.A.

In that case a widow eighty-six years old transferred £6,000 consols into the names of herself and her godson. Two years afterwards she married again, and some time after her marriage caused a letter to be written to him requiring him to retransfer the stock to her. This letter was the first knowledge or notice that the godson had of the transfer, and it was held that his title as transferee was complete, although the plaintiff had revoked the transfer, so far as she could, before he had notice. The Court affirmed the principle that a transfer of property to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of the transfer. At page 288, Cotton, L. J., says: "I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, 'I will not take it.'" When informed of it, he may repudiate it, but it vests in him until he so repudiates it.

This gift, therefore, became effectual in the plaintiff the moment it was completed by the deposit to her credit, or at all events, by the issue in her name of the receipt; and it was no longer in the power of the husband or of the bank, or of both together, to undo what had been done, or to deal with the money so deposited without the plaintiff's consent.

In my judgment, therefore, the appeal fails and must be dismissed.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal dismissed with costs.

MCDONALD V. DICKENSON ET AL.

*Municipal Corporations—Municipal Councillors—Pathmaster—Negligence
—Ways—Notice of Action—R. S. O. ch. 73.*

THIS was an appeal by the defendants from the judgment Statement.
of the Queen's Bench Division, reported 25 O. R. 45, and
was argued before HAGARTY, C. J. O., BURTON, OSLER, and
MACLENNAN, JJ.A., on the 26th of September, 1894.

J. M. Glenn, and J. A. McLean, for the appellants.

N. McDonald, and W. J. Tremear, for the respondent.

At the conclusion of the argument the appeal was dismissed with costs. The Court agreed with the views expressed in the judgment below as to notice of action, and as to the further point urged by the appellants, viz., that the right of action, if any, was against the township, expressed no opinion, thinking that that question had not been properly raised by the pleadings or tried. Leave to amend was given.

WATEROUS ENGINE WORKS COMPANY V. McCANN.

Mortgage—Fixtures—Machinery—Lien Agreement—Double Fire Insurance.

The plaintiffs sold certain mill machinery under an agreement which provided that a mortgage of the mill property was to be given to them by the purchasers to secure the price ; that the machinery was not to form part of the real estate, but was to remain personal property ; that the title was not to pass till payment of the price ; and that the plaintiffs might insure the machinery.

After the machinery was placed in the mill, the purchasers gave to the plaintiffs a mortgage on the mill property, and this mortgage contained a covenant to insure.

Subsequently the plaintiffs insured the mill and machinery, and the purchasers, without their knowledge, also placed insurance thereon.

The mill and machinery were destroyed by fire, and the plaintiffs were unable to recover on the policies held by them, owing to the breach of statutory condition 8, and they claimed the benefit of the purchasers' insurance of the machinery :—

Per HAGARTY, C. J. O., and MACLENNAN, J. A. That the plaintiffs were entitled to the moneys payable to the purchasers under their policy, the mortgage being the governing instrument :—

Per BURTON, and OSLER, JJ.A.—That they were not so entitled, the machinery being by the agreement personal property and not included in the mortgage or protected by the covenant to insure.

In consequence of the division of opinion, the judgment of FALCONBRIDGE, J., in favour of the plaintiffs, was affirmed.

Statement. THIS was an appeal by the defendant from the judgment of FALCONBRIDGE, J., in favour of the plaintiffs upon the special case hereinafter set out, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 25th of April, 1894.

F. A. Anglin, for the appellant.

W. H. Blake, and *A. E. Watts*, for the respondents.

The plaintiffs are an incorporated company, carrying on business as manufacturers of and dealers in machinery, boilers and engines, at the city of Brantford, in the county of Brant.

Joseph Jenkins and Henry Hatton, both of the township of North Dorchester, in the county of Middlesex, were at the time of entering into the contract, in the next succeeding paragraph of this case mentioned and referred

to, engaged in the business of grist millers at the said town-
ship of North Dorchester, and were the owners of a certain
mill site and certain buildings thereon erected, the said mill
site being all and singular that certain parcel or tract of land
and premises situate, lying and being in the township of
North Dorchester in the county of Middlesex, and being
composed of part of lot number twelve, fifth concession of
the township of North Dorchester, south of the river
Thames, and containing by admeasurement one-half of an
acre, more or less. Statement.

On the fifteenth day of February, A.D. 1892, by an
agreement in writing entered into between the plaintiffs
and the said Joseph Jenkins and Henry Hatton, bearing
that date, the said Joseph Jenkins and Henry Hatton
agreed to purchase from the plaintiffs and the plaintiffs
agreed to sell to the said Joseph Jenkins and Henry Hat-
ton a quantity of grist mill machinery, which said ma-
chinery is particularly mentioned in the said agreement or
contract, subject to certain conditions mentioned in the
said contract, one of which conditions being that the said
Joseph Jenkins and Henry Hatton should give to the
plaintiffs a first mortgage on the said mill property of half
an acre as partial security for the payment of the purchase
money mentioned in the said contract, of which purchase
money there was at the date of the mortgage hereinafter
mentioned or referred to remaining unpaid the sum of four
thousand three hundred and seventy-five dollars.

And by the said agreement it was also agreed between
the parties thereto, that notwithstanding the cash pay-
ments and giving of the promissory notes therein men-
tioned to be given by the said Jenkins and Hatton to the
plaintiffs, or of a mortgage, neither the property in, nor the
title to the said machinery, was to pass to the said proposed
purchasers, but was to remain the property of the plain-
tiffs, nor should the said machinery be attached to so as to
form a part of any real estate, and if so attached, is not
to be considered as any part of any real estate, but shall
remain personal property until the full payment of the

Statement. known as the "Act respecting Short Forms of Mortgages," and under the other laws in force in the Province of Ontario respecting the rights of mortgagees to insurance moneys on mortgaged property.

June 30th, 1894. BURTON, J. A. :—

Had the mortgage stood alone, there could have been no doubt of the right of the plaintiffs to recover by reason of the covenant contained in it to insure and to assign over the policies to the mortgagees. See *Watt v. Gore District Mutual Insurance Co.*, 8 Gr. 523 ; *Greet v. Citizens' Insurance Co.*, 5 A. R. 596, and other cases.

But it and the agreement must be read together, and the plaintiffs cannot, in my opinion, be allowed for one purpose to treat the machinery as chattels, and for another to claim that it forms part of the realty. The plaintiffs' claim, therefore, under the covenant is confined to the damage to the building, amounting to \$360, and as to that there was on the argument no contest, both parties agreeing that the plaintiffs were entitled to recover to that extent.

As to the remainder of the insurance, I agree in the judgment of my brother Osler, and am unable to discover any ground, legal or equitable, for giving the benefit of it to the plaintiffs.

It is not necessary to enquire what would have been the position of the plaintiffs had they insured in their own names and for their own benefit as owners. If they had done so simply in that character, and without reference to the agreement, it is of course clear that their insurance would not have been affected by the subsequent insurance by the purchasers—their interests being clearly distinct—but as the agreement provides that in such a case they might charge the premiums to the purchasers, it might, perhaps, be urged that the insurance was for the joint benefit, and might, therefore, be avoided by a subsequent insurance effected by either. However that might have been, the plaintiffs unquestionably by insuring as they did.

ran the risk of their insurances being invalidated by the act of the purchasers who had notice of the first insurance. The plaintiffs may, perhaps, not be without remedy for the wrong done to them by the purchasers' effecting a further insurance which operated in that way, but I know of no principle upon which a Court could give them a right to the insurance money obtained upon the purchasers' own policies; it would have been easy to provide that in the event of the purchasers doing anything which might otherwise have the effect of invalidating the first policies, it should not apply to them, but they should thenceforth be regarded as insurances effected solely for the benefit of the owners, and that the insurers should be subrogated to the rights of the owners in respect of the debt *pro tanto*, but in the absence of such stipulation I see no means of escape. I see no way of aiding the plaintiffs, much as I might wish to do so.

Judgment.

BURTON,
J. A.

I am of opinion, therefore, that to the extent I have mentioned, the appeal should be allowed.

OSLER, J. A. :—

The plaintiffs sold to Jenkins and Hatton an engine and boiler, and other mill machinery, which was afterwards destroyed by fire, and the question is, who is entitled to receive the proceeds of a certain policy of insurance thereon, the plaintiffs or the defendant as assignee for the general benefit of the creditors of Jenkins and Hatton.

The following facts appear :

The machinery was sold under special contract, dated 15th February, 1892, the important conditions of which were (1) that Jenkins and Hatton should give the plaintiffs a first mortgage on the mill property of half an acre, described in the agreement, to secure payment of the balance of the principal and interest; (2) that notwithstanding cash payments, or giving of promissory notes or of a mortgage, the property in or the title to the ma-

Judgment.

OSLER,
J.A.

chinery, was not to pass to the proposed purchasers, but was to remain the property of the plaintiffs, nor should it be attached to so as to form a part of any real estate; and, if so attached, was not to be considered as any part of any real estate, but should remain personal property until the full payment of the price, etc. The purchasers were to have possession and to use the same until default in payment, etc. Then followed special clauses as to the cases in which the plaintiffs might resume possession of the machinery; and (3) the plaintiffs were authorized to insure the machinery in any good company for two-thirds of the sum remaining due.

The machinery was afterwards delivered and placed in the mill building on the mill site, and remained there until the mill was burnt.

On the 5th May, 1892, by indenture made in pursuance of the Act respecting Short Forms of Mortgages, between Jenkins and Hatton as mortgagors, and the plaintiffs as mortgagees, after reciting that Jenkins and Hatton had purchased a quantity of mill machinery mentioned in the contract of 15th February, 1892, subject to certain conditions mentioned therein, one of which was that the mortgagors would give to the mortgagees a first mortgage on the mill site and buildings thereon and all machinery therein as partial security for payment of the machinery, the mortgagors granted or mortgaged to the mortgagees all that parcel of land consisting of part of lot twelve in the fifth concession of North Dorchester, containing half an acre as particularly described.

The mortgagors covenanted to insure the buildings on the said land to the amount of not less than \$3,000.

After the execution of the mortgage, the plaintiffs effected insurances in the names of Jenkins and Hatton, payable in the event of loss to the plaintiffs, in two insurance companies for the following sums, \$600 on the building (presumably the mill), \$250 on the engine and boiler and water connections and stock, and \$2,150 on movable and fixed machinery, shafting, belting, tools and scales (pre-

sumedly the engine, machinery, etc., mentioned in the agreement), in all \$3,000.

Judgment.

OSLER,
J.A.

The date on which these insurances were effected is not stated, but afterwards on the 19th November, 1892, and while they were in force, Jenkins and Hatton effected an insurance in the Queen's Insurance Company on the building, machinery and stock, to the amount of \$3,500, the policy being in their favour, payable in the event of loss to them. The policy was not assigned to the plaintiffs, nor is it stated that an assignment was ever demanded.

On the 24th November, 1892, the plaintiffs wrote to Jenkins and Hatton, stating the particulars of the insurances effected by them, though not that the policies were in the name of the latter, and that if they, Jenkins and Hatton, put on any more insurance, they must notify plaintiffs at once, so that they could notify the companies in which they had themselves insured, "or else our insurance will be null and void and yours would probably be the same."

This letter, if, as may be assumed, it was received by Jenkins and Hatton, was the first and only notice given them of the insurances effected by the plaintiffs. It does not appear that its reception was ever acknowledged, or that they informed the plaintiffs of the policy effected by them in the Queen's Insurance Company.

On the 17th December, 1892, the mill works, the stock, boiler, engine, and machinery therein as insured in the Queen's Insurance Company, were totally destroyed by an accidental fire.

The loss was adjusted, building, \$360; machinery, \$1,325.25; in all, \$1,685. The special case states that in consequence of the omission of Jenkins and Hatton to notify the plaintiffs or the companies in which they had insured, of the further insurance in the Queen's Insurance Company, the former companies denied any liability on account of their policies.

It may be assumed, though the policies are not before us, that they contain the statutory condition No. 8, R. S. O.

Judgment.

OSLER,
J. A.

ch. 167, sec. 114, which provides that the company is not liable for loss if a subsequent insurance is effected in any other company unless and until the company assents thereto, or unless it does not dissent in writing within two weeks after receiving written notice of intention or desire to effect the subsequent insurance, or does not dissent in writing after that time, and before the subsequent or further insurance is effected.

On the 24th December, 1892, Jenkins and Hatton assigned their estate and effects to the defendant McCann, as assignee, for the general benefit of their creditors, pursuant to R. S. O. ch. 124.

The defendant contends that the insurance money passed to him under the assignment.

The plaintiffs contend that they are entitled to them, or some part thereof, under the covenant to insure contained in their mortgage and other laws in force respecting the rights of mortgagees to insurance moneys on the mortgaged property.

This case must, in my opinion, be disposed of as if the contest as to the insurance money had arisen between Jenkins and Hatton and the plaintiffs. The defendant, as their assignee, cannot stand in a higher position than they do, where, as here, the Legislature has not said that he shall.

The first question, the solution of which goes far to determine the rights of the parties, is, what passed to the plaintiffs under the mortgage of the 5th May, 1892.

If the machinery referred to in the agreement of the 15th February, 1892, passed thereby as part of the land conveyed in the same way as, and as forming part and parcel of, the mill erected on the land, then there is no difficulty in holding that it is within the covenant to insure the buildings on the lands, and that the plaintiffs are equitably entitled to the whole of the insurance moneys by force of the covenant: *Greet v. Citizens' Insurance Co.*, 5 A. R. 596; 27 Gr. 121; or under R. S. O. ch. 102, sec. 4 (2), the Act respecting Mortgages of Real Estate: *Edmonds*

v. *Hamilton Provident and Loan Society* 18 A. R. 347. If Judgment.

OSLER,
J.A.

the fixed machinery was, as under ordinary circumstances it would be as between mortgagor and mortgagee of the freehold, part of the land on the principle *quicquid plantatur solo solo cedit*, the mortgagees' right could not be affected by reason of the insurance company having for their own purposes separately insured the mill and the machinery thereon for different amounts: *Carr v. Fire Assurance Association*, 14 O. R. 487. This, however, is not the ordinary case. It is apparent on the face of the mortgage that it was made in pursuance of the agreement, which is recited therein, though inaccurately. It does not purport to convey the machinery, and we see that by the agreement it is expressly stipulated between the parties, not merely that the property in and title to the machinery, shall not pass to the proposed purchasers until payment of the price; but also, that notwithstanding the giving of a mortgage, it shall not pass, and that even if attached to "real estate," it is not to be considered as part of any "real estate," but shall remain personal property until full payment has been made. By the same agreement the proposed purchasers contract to give a first mortgage "on the mill property, one-half acre," and it is this which, under a more precise description, the mortgage purports to convey. I do not think that the erroneous recital of this term of the agreement as a condition, "that the mortgagors should give the mortgagees a first mortgage on the mill site and buildings thereon and all machinery therein," can be regarded as indicative of an abandonment by the plaintiffs of their larger rights under the agreement, and of an intention that the machinery should, notwithstanding, become and be treated as part of the realty, and capable of passing and being conveyed under general terms, appropriate to a conveyance of that description of property. The agreement, moreover, contains a clause by which the plaintiffs were amply protected in respect of insurance. As personal property, the title to which remained in them, and in which they were so largely interested, they were of course en-

Judgment.

**OSLER,
J.A.**

titled to insure in their own names, but the agreement gives them the right to charge the premiums to the purchasers, and makes the premiums a charge on the property in the same way as the unpaid purchase money. I think, therefore, though on the argument I had rather a different impression as to the scope of the mortgage, that neither under the covenant nor under section 4 of the statute (a section which I think is necessarily confined to the insurance on the mortgaged property), are the plaintiffs entitled to more of the insurance than \$360, the amount adjusted in respect of the building.

The plaintiffs, however, argue that even if their claim to the insurance fails under the covenant, yet they have an equity to it because the insurance they had themselves procured was defeated or lost by means of the mortgagors' act in effecting the insurance now in question, without the assent of the prior insurers. Now, as to this, it must be observed that the right of the plaintiffs was to insure their interest in the machinery in their own names and to charge the premiums to the purchasers under the agreement. The mortgage conferred upon them no right to insure either the machinery or the mill, either in their own names or in that of the mortgagors, though they might have required the mortgagors to insure the latter, and were entitled to the benefit of such insurance.

The mortgagors were entitled to insure their own interest in the machinery and they did so, but without notice, so far as appears by the special case, of the unauthorized insurance which the mortgagees had already obtained; unauthorized, I mean by the mortgage, and unauthorized by the agreement, as having been obtained in the name of the mortgagors. This being so, I cannot see how the fact that the mortgagors omitted to answer the mortgagees' letter of the 24th November, gives the latter an equity to receive the mortgagors' insurance, except to the extent that it was an insurance under the covenant in the mortgage. The difficulty has been caused by the mortgagees themselves not insuring in the only way they were entitled to do.

This can give them no right to the insurance which the mortgagors were justified in obtaining for themselves.

Judgment.

OSLER,
J.A.

The appeal should be allowed with costs, and the plaintiff's recovery restricted to the sum of \$360, and the answer to the questions submitted modified accordingly. Costs below are governed by the agreement.

MACLENNAN, J. A. :—

If the rights of the parties depended alone on the land mortgage, there could be no doubt of the right of the plaintiffs to recover the insurance money in question. The mortgage contains a covenant to insure the messuages and buildings on the mortgaged lands to the amount of \$3,000, and to assign and deliver to the mortgagees the policy and receipts, etc. The insurance having been effected, it must be taken to have been made in pursuance of the covenant; and although neither the policy nor the receipt was assigned to the plaintiffs before the fire, the plaintiffs have the same right to an assignment of the insurance money as they had to an assignment of the policy and the receipt or receipts.

If there could have been any doubt of the plaintiffs' right, as I have thus stated it, by virtue of their mortgage and the covenant contained therein, it would be wholly removed by the provisions of the Mortgage Act, R. S. O. ch. 102, sec. 4. Sub-section 2 of that section enacts that without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards the discharge of the money due under his mortgage. This section 4 seems to have been intended to take the place, and to extend the operation of, the Imperial Act 14 Geo. III. ch. 78, which was held to be in force in this Province, and to be enforceable by a mortgagee: *Stinson v. Pennock*, 14 Gr. 604; and accordingly the Imperial Act was repealed as to this Province in the following Session by 50 Vic. ch. 26, sec. 154 (O.). We had occasion to

Judgment. consider section 4 in *Edmonds v. Hamilton Provident and*
MACLENNAN, *Loan Society*, 18 A. R. 347, but in that case the insurance
J.A. money had been received by the mortgagees, and the question was as to its application in payment of the debt. But it was recognized that by that section fire insurance effected by a mortgagor is now, in the absence of agreement to the contrary, part of the mortgagee's security.

It is said, however, that the agreement between the mortgagors and mortgagees in this case must be regarded; and that by that agreement the machinery which was the subject of it was to be and remain the property of the mortgagees, notwithstanding the mortgage, and that it was, therefore, in effect, not included in the mortgage, and the insurance upon it, is, therefore, not within the covenant or the Mortgage Act; and that objection must now be considered.

The agreement referred to is dated the 15th February, and is for the manufacture by the plaintiffs for Jenkins and Hatton, a firm of millers, of a steam engine and boiler, and also of a roller grist-mill with all the necessary adjuncts, the whole to be erected upon the freehold of the mortgagors. The price was to be \$5,100, of which part was to be paid down, and for the balance promissory notes were to be given, payable in sums of \$300 every three months. The purchasers agreed to give a first mortgage for the purchase money on the mill property, being half an acre of land; and it was stipulated that notwithstanding the cash payment and the giving of notes, or of a mortgage on the property, title to the machinery was not to pass to the purchasers, but it was to remain the property of the plaintiffs; nor was the machinery to be attached so as to form a part of any real estate, and if so attached, it was not to be considered as any part of any real estate, but was to remain part of the property until full payment of the price and of any obligations therefor, etc.; but the purchasers were to have possession and use thereof until default in payment of the price or some part thereof, or some obligation given therefor. The

machinery was to be at the purchasers' risk of fire; and in case of any default, the vendors could resume possession to secure their debt.

Judgment.

MACLENNAN,
J.A.

It was also provided that in the event of resuming possession or selling the machinery, the vendors should have the right to collect the deficiency, if any, from the purchasers. It was also provided that the plaintiffs might insure the machinery for two-thirds of the debt and charge the premiums to the purchasers; and that in that case the premiums should become a charge, the same as the debt. By one of the terms of this agreement, the machinery was to be delivered on or about the 1st of April, 1892, and the appeal case states that in pursuance of the contract the machinery was all furnished and delivered to and placed in the mill of Jenkins and Hatton by the plaintiffs; and that the former carried on their business as millers with the said machinery, boiler and engine; and on the 5th of May, 1892, executed the mortgage in question to secure \$4,375 remaining due and unpaid under the contract.

The case, therefore, is that after the making of the contract, and before the mortgage, the machinery in question was by the act of the plaintiffs themselves, and with the assent of the purchasers, affixed to the freehold of the purchasers, and became in law parcel thereof. It was not a case of trade fixtures as between landlord and tenant, or a case of fixtures at all. The machinery became in law part of the freehold, subject to an agreement between the owners of the freehold and the plaintiffs that for certain purposes as between them it should remain personal property. The machinery was, therefore, in law, real estate, but in equity, as between the parties, and by virtue of their agreement, it was to be regarded as personal property.

The agreement of sale was made on the 15th February. It was not under seal. The mortgage is in the statutory short form, and was made on the 5th of May afterwards, and it is, of course, by deed. While, therefore, both the instruments refer to each other, and must be read together,

Judgment. if there is any want of harmony or any inconsistency in
MACLENNAN, their provisions, the later and more solemn instrument
J.A. must prevail.

Now, it was quite competent to the parties, if they thought fit when giving the mortgage, to qualify the terms of the previous agreement; or to define or expand the sense in which they understood it; and, therefore, if the recital and covenant to insure should be deemed at variance with, or wider than the agreement, I think we ought still to give effect to them. I do not myself see any inconsistency between them. The agreement merely gave the plaintiffs the option of insuring. They might or might not. If they did, that did not prevent the mortgagors doing the same, nor that both insurances should stand as security for the debt. In no case could the plaintiffs recover more than their debt.

Now, the meaning of the mortgage is clear. The agreement recited is, that the mortgage should cover the mill site and buildings thereon and all machinery therein, and upon the true construction of the deed I think it clear, the machinery is included both in the grant and in the covenant for insurance. That being so, I think it is immaterial that for another purpose the parties had agreed that, notwithstanding the mortgage, the property should be regarded as personal property. That agreement was for a limited purpose. It was to enable the plaintiffs to take back the machinery, to sever it if necessary from the land in order to secure their debt.

It was not disputed that notwithstanding the agreement the purchasers had an insurable interest. If so, why should that interest not have passed by the mortgage to the plaintiffs as security? I see no reason. If it be assigned as a reason that while the mortgagors had an insurable interest as against the rest of the world, they had none as against the plaintiffs, that must be by way of estoppel, and by reason of the agreement only. But if the plaintiffs are to be estopped by the agreement, why are the mortgagors not still more estopped by the later instrument.

which is a deed, and contains a solemn recital inconsistent with the agreement?

Judgment.
MACLENNAN,
J.A.

Upon the whole, I see no reason for depriving the plaintiffs of the benefit of the insurance stipulated for in the mortgage; and I do not think it necessary to refer to the insurance which the plaintiffs had effected in other companies. I do not see how the case is affected by it in any way.

I think the appeal should be dismissed.

HAGARTY, C. J. O. :—

I agree with my brother Maclennan.

*The Court being divided in opinion,
the appeal was dismissed with costs.*

GIBSON V. TOWNSHIP OF NORTH EASTHOPE.

Drainage—Petition—Withdrawal.

The plaintiff in 1884, after signing a petition for the construction of a drain, wrote to the council objecting to the work for reasons set out, but in 1885 the council passed the necessary by-law and issued debentures. Subsequently the plaintiff gave notice of his intention to move to quash the by-law, but afterwards he withdrew this notice and tendered for the work. In 1889, he attacked the by-law, alleging, among other grounds, that it was void by reason of his withdrawal:—

Held, per HAGARTY, C. J. O., that before 53 Vic. ch. 50, sec. 35 (O.), a petitioner could not withdraw.

Per BURTON, J. A.—That there was no power of withdrawal, and that in any event the question whether there had been withdrawal or not, was for the council.

Per OSLER and MACLENNAN, JJ.A.—That there was a power of withdrawal, but that there had in fact been no withdrawal, and that even if there had the plaintiff was estopped from maintaining the action, his conduct having been such as to induce the council to believe that their jurisdiction was not contested.

Judgment of the Queen's Bench Division reversed.

Statement. THIS was an appeal by the defendants from the judgment of the Queen's Bench Division.

The plaintiff, who was the owner of land in the township of North Easthope, brought the action in 1889 to have a drainage by-law passed in 1885 and in that year acted upon declared illegal, and he claimed repayment of assessments paid by him and damages. He also alleged that the work had been negligently done, and that no proper outlet had been made, and in the alternative asked that the defendants should be ordered to complete the work properly, and he also asked that they should be restrained from bringing water upon his land through a culvert constructed by them.

A mass of evidence was taken before Proudfoot, J., and Woods, Co. J., and on this evidence the case was argued before MEREDITH, J., who, on the 13th of July, 1891, gave judgment holding that the by-law was valid, but directing certain repairs to be made to the drain and declaring that the defendants had no right to bring water on the plaintiff's land through the culvert. On motion

by the plaintiff to the Queen's Bench Division he obtained all the relief prayed for, and the defendants then appealed, their appeal being argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 13th, 14th and 15th of March, 1894. Statement.

Idington, Q. C., for the appellants.

J. B. Rankin, for the respondent.

June 30th, 1894. HAGARTY, C. J. O. :—

The judgment of the Divisional Court turned almost wholly on their view as to the insufficiency of the petition and the consequent want of jurisdiction in the municipality to proceed with the work. This depended on the right of withdrawal of the plaintiff's name and of one Makins who had originally signed the petition.

The learned Judges considered that the petitioners had a right to withdraw from the petition, and the decision of Wilson, C. J., in *In re Misener and Wainfleet*, 46 U. C. R. 457 (1882), was relied on, as we are informed. The Court does not discuss the question of the right of withdrawal, but assume it to exist.

That case was peculiar and laid down some propositions with which we may safely agree, *viz.*: that where a specified improvement is asked for, the council cannot proceed to enter upon a work wholly different. "If" as the learned Chief Justice Wilson says "the council can act as they please when a petition is put in, they might build a bridge in place of a culvert, or drain in a contrary direction to that desired," etc.

He holds very distinctly that a petitioner may withdraw after subscription, up to the time of making the contract for the work or until negotiation of debentures or money raised for prosecution of the work. But no authority is cited as to withdrawal, nor has any been cited to us under our Municipal Acts. He was also of opinion that parties could not so withdraw without paying the costs so far incurred by the council.

Judgment.

HAGARTY,
C.J.O.

This petition was presented in 1884, and a by-law was at once passed appointing a surveyor. A counter petition was presented on the 25th August, 1884, and there was much contestation as to whether a certain person had afterwards desired his name to be erased therefrom.

The surveyor's report under the by-law bears date July 30th, 1884.

The matter was discussed in council in August, and the counter petition was discussed. It was adjourned to September, and again to 13th October, and after the explanation of the engineer several names appear to have been withdrawn from the counter petition.

Again they met 24th November, 1884, and a letter from the plaintiff was presented objecting to the scheme chiefly on the ground of the council's delay in losing the season of 1884 for the work.

On December 13th, the plaintiff was notified that unless all costs respecting the drainage work accrued up to date be paid the requisite by-law would be passed at their next meeting.

On the 10th January, the by-law was passed and provisionally adopted. The usual proceedings as to assessment and revision were taken.

On March 30th, 1885, the by-law was finally passed.

On the 9th April following the plaintiff notified the council of his intention to move to quash the by-law so far as it affected him and his two named lots.

Again, by a notice served on the 24th April, he withdrew the last notice and asked to be granted the privilege of constructing the drain proposed by the by-law in a more proper manner than was set out on the profile as he considered the dimensions of the ditch to be insufficient, but that he would improve it at his own expense, failing which he would demand compensation for the work he had already done on the drain. Tenders were then advertised for and one (among others) from the plaintiff was received offering as to certain specified work a named sum to complete the same according to the profile to the satisfaction of persons employed to examine the same.

The contract was given to others and executed in June, 1885, and in July, 1885, debentures were issued and sold.

Judgment.

It appeared that the plaintiff had complained as the work proceeded that the drain was not of sufficient capacity and not deep enough by the plans.

HAGARTY,
C.J.O.

The assessments were levied on the plaintiff and others. In the first year he allowed his rate to be distrained for, and he paid the next year under protest and sued unsuccessfully in the Division Court to recover the same, but was nonsuited.

All the details of the numerous proceedings are set out in the very laboriously careful judgment of Mr. Justice Meredith, which I have carefully examined, and with the result arrived at by him I substantially concur.

The Divisional Court's decision is wholly based on the alleged want of jurisdiction, or, in other words, the insufficiency of the petition by which the council was set in motion, recognizing the right of original petitioners to withdraw their names.

By the Act of 1890, 53 Vic. ch. 50, sec. 35 (O.), provision was made to allow withdrawal. It now appears in the Consolidated Municipal Act of 1892, sec. 509, sub-sec. 22, and any person who has signed a petition may withdraw therefrom and abandon such petition at any time before the expiry of the time limited for appealing from the proposed assessment to the Court of Revision, but not afterwards, and if the proposed work be not proceeded with on account of such withdrawal from the petition, then the persons signing such petition, including those who have withdrawn therefrom, shall be *pro rata* chargeable with and liable to the municipality for the expenses incurred in connection with the petition, and the amount shall be entered in the collector's roll and be collected as other sums, etc.

It is not suggested that there had been any previous legislation as to withdrawing or payment of expenses. I need hardly say with what respect I view any decisions of our late colleague Sir Adam Wilson, but, as already

Judgment.

HAGARTY,
C.J.O.

noticed, he has not discussed the state of the law but has apparently assumed it to be as he decides, and he adds that the withdrawal should be on payment of the expenses incurred, and thinks that the making of the contract and other matters would put an end to such right to withdraw.

If the right existed it is not easy to see up to what time it was necessarily limited, nor in what manner the expenses could be recovered.

I feel compelled to hold that the right to withdraw did not in 1884 exist, as claimed here. The council was set in motion by a duly signed petition and jurisdiction thereby given for the subsequent proceedings.

If Makins and the plaintiff be reckoned as petitioners it is conceded that the petition was sufficient to base jurisdiction. The evidence as to Makins afterwards withdrawing from the counter petition of August was exceedingly unsatisfactory. The Queen's Bench Division considered it was not proved that he so withdrew. Our learned brother Meredith held otherwise.

I have read Makins' evidence and find it most difficult to rely much on it.

As I do not agree with the Court in following Sir Adam Wilson's decision, I do not think it necessary to further discuss the question of withdrawal.

As to the plaintiff, in addition to our application of the law to Makins' case, I can hardly understand his being allowed to deny that he is responsible as an original petitioner for giving jurisdiction to the council.

It was extremely difficult for the council or any one else to have a clear view of his position except that he was quite content to let the project be carried out provided he was allowed to manage it according to his own ideas, but that he would oppose it if his views were not adopted.

He gives notice of moving to quash the by-law, so far as it affected his property. He then notifies them that he abandons such notice and asks them to give him the construction of the work in a better manner than the profile required, such improvement to be at his own expense.

Again he sends in a tender offering to do certain of the work at a named price under the profile, etc.

At the Court of Revision he appeared and objected to certain assessments, and afterwards abandoned his appeal in writing.

I am unable to understand how such a course of conduct on a petitioner's part could be tolerated.

If he could not legally withdraw it is not absolutely necessary further to discuss whether he had not by his "fast and loose" course of preceding debarred himself from any supposed right of withdrawal, but I have a very strong opinion against his right to act as he has done.

In 1884 the Supreme Court decided against the right of persons after their petition on the Canada Temperance Act had been lodged with the Secretary of State to withdraw their names therefrom. The case is not further reported than as noted in Cassels' Digest, p. 106: *In re Canada Temperance Act and The County of Kent*.

Meredith, J., adopted the view that the right of withdrawal existed, under Wilson, C. J.'s, decision. He considered Makins as proved to have withdrawn his withdrawal, and considered that the plaintiff had not formally withdrawn, and that by his conduct he must be held as an original petitioner and precluded from so doing.

There is much force in the manner in which the learned Judge presents his view, and I think the evidence supports it.

I also find and determine that the plaintiff is by his acts and acquiescence precluded from obtaining the relief claimed in regard to this by-law. It is needless to repeat the facts which have been already stated bearing upon this point. Looking only at the writings bearing upon the question there is sufficient clear and unequivocal evidence to sustain this defence. It would be a strange thing if now years after the passing of the by-law, the borrowing of the money, and the making of the drain, and after all the use and benefit of it which the plaintiff has had, the Court would at his instance declare the whole proceedings illegal, the de-

Judgment.

HAGARTY,
C.J.O.

Judgment.
HAGARTY,
C.J.O.

fendants and those acting under them trespassers, and the plaintiff entitled not only to a return of the money paid by him and interest but to damages.

I think the learned Judge rightly disposed of the charges against the engineer and the clerk and the objections as to the drain not being made substantially in accordance with the profile and contract, also as to depth at one place. As to the extra bringing of water upon the plaintiff's land, the Judge holds that there was no appreciable or substantial damages proved. But he holds this to be unlawful, and something that might ripen into a right, and the order of the Court is that the defendants have six months to acquire the right, and in default they are enjoined from so discharging the water on the plaintiff's land. Also that the defendants have allowed the drain to become filled up and out of repair, and inadequate, and the defendants are ordered to put the same in repair.

There is no cross-appeal against these findings in favour of the plaintiff. They dispose of a large portion of the numerous complaints made by the plaintiff, assuming the by-law to be held valid.

I have not discussed the point whether under section 292 of the Act of 1883, 46 Vic. ch. 18 (O.), (which governs the case), it may be held that the council duly disposed of the objections to the petition as to sufficiency of the signatures.

In *In re Robertson and North Easthope*, 16 A. R. 214, we had occasion to notice this point. It is not very plain whether the investigation allowed by these sections ever in effect took place, or that the council held the enquiry for evidence and determination contemplated by the Legislature. I prefer resting my decision upon the other grounds.

I think that the appeal must be allowed, and the judgment of the trial Judge restored.

BURTON, J. A.:—

In this action, commenced on the 19th February, 1889, against the municipality to recover *inter alia* damages

for flooding the plaintiff's lands by means of works constructed under a by-law passed early in 1885 in pursuance of the drainage clauses of the Municipal Act, the plaintiff bases his claim chiefly on the ground that the by-law was illegal and void by reason of the petition for it not having been signed by a majority in number of the persons shewn by the then last revised assessment roll to be the owners of the property to be benefited, but in the event of the by-law being held to be legal he claims damages by reason of negligence in the construction.

Judgment.

BURTON,
J.A.

When the petition was first presented it was signed, as the learned trial Judge has found, admittedly by the requisite number of petitioners, including the plaintiff, and the by-law was introduced provisionally appointing a surveyor to make the necessary survey, plans, and estimates.

After the completion of the survey, and when the matter came again before the council, a counter-petition, as it is called, was presented against proceeding with the work, signed among others by seven of the original petitioners, and the matter was adjourned to enable the council to obtain legal advice. It was adjourned again once or twice and the matter discussed in the presence of the parties, and on explanations being received from the engineer several of the opponents withdrew their objections, and even assuming that petitioners having once set the council in motion could legally withdraw their names after expenses had been incurred, there was still a majority if one John Makins who was originally a petitioner had not withdrawn and the plaintiff had not ceased to be a petitioner.

The learned trial Judge found that John Makins had not withdrawn, and that the plaintiff had never ceased to be a petitioner.

The by-law was never moved against, but on the contrary, if not originally void for want of the requisite number of petitioners, is claimed to be validated if validation were necessary by notice given under section 573 of 46 Vic. ch. 18 (O.)

Judgment.

BURTON,
J.A.

The Divisional Court reversed this decision and held the petition not to be signed by the requisite number.

We are brought face to face, therefore, with the question of whether the petitioner had a right to withdraw after setting the council in motion, and whether there is any power in the Court, in a proceeding of this nature, to reverse the finding of the council itself, who, in my opinion, were a domestic forum constituted by the Legislature to decide summarily and finally whether this condition precedent to the passing of the by-law had been complied with.

None of the names in question were ever struck off the petition. A document was presented desiring their names to be removed, and after many adjournments and much discussion the council, though in a very informal way, did, I think, proceed to decide, and seemed to be satisfied, that the petition was sufficiently signed.

The inconvenience of having a question of this kind raised years after the passing of the by-law and the execution of the work is manifest, but a perusal of sections 292 and 293 of 46 Vic. ch. 18 (O.) seems to fortify the view that such a withdrawal was not contemplated, and they point out, I think, very clearly the grounds upon which alone the sufficiency of the petition can be enquired into.

1. Any person objecting that the necessary notice was not given ;

2. Or that some of the signatures are not genuine, or were obtained upon incorrect statements, and that the proposed by-law is contrary to the wishes of the persons whose signatures were so obtained, and that the remaining signatures do not amount to the number nor represent the amount of property necessary to the passing of the by-law.

These matters were fully and frequently discussed before the council who were satisfied that the petition was sufficiently signed by persons whose names were obtained without fraud and in good faith, and they proceeded to act upon the by-law.

It is not necessary to decide whether any appeal could be taken against that decision upon a motion to quash the by-law. I may state my own opinion that it was not the intention of the Legislature to allow any appeal, but that it was intended that the decision of the council upon all such preliminary matters should be final and conclusive.

Judgment.

BURTON,
J.A.

In making this remark I am aware that it has been said that when such a by-law is relied on the onus of shewing that jurisdiction had attached was upon the municipality; and indeed one of the Judges in *In re Robertson and North Easthope*, 16 A. R. 214, in this Court, expresses the opinion that the decision of the council as to the sufficiency of the number signing the petition is not final. I took part in that decision, and whilst not concurring in that view I did not think it necessary to state my dissent as I agreed in the result. There the petition was not signed by the requisite number. It was not a question of whether the parties signing were disqualified or had been imposed upon; and I do not question the right of the Court to quash where there has been no notice or petition; but where any question arises as to the signatures or as to fraud practised upon the petitioners to obtain their signature, I submit with great confidence that the Legislature intended to submit such questions to a domestic forum best qualified in my judgment to decide it, and not to leave it to be decided by a Court years afterwards.

The recent statute 53 Vic. ch. 50, sec. 35 (O.) seems, I think, to confirm the view of the Legislature that previously to its passage a petitioner had not the right to withdraw, but it would have been more equitable, I should have thought, to visit him with the costs and to have relieved the other petitioners who were no parties to his action.

I am of opinion, therefore, that the judgment of Mr. Justice Meredith holding that the by-law was valid was correct.

If valid, it is clear that no action could be maintained against the council for the manner in which the work was done by the contractors.

Judgment. OSLER, J. A. :—

OSLER,
J.A.

The by-law which is attacked in this action is a drainage by-law passed provisionally in the usual way on the 10th January, 1885, and finally on the 30th March, 1885.

In that year the debentures authorized to be issued to meet the original cost of the construction of the works were issued and sold. These debentures were to run for ten years, payable in ten equal yearly payments from March, 1885, and the yearly assessments to meet the same have been made and paid, and several by the plaintiff himself among others.

The works authorized by the by-law were constructed in the years 1885 and 1886, and through the plaintiff's own farm in 1885, and this action was not brought by him until the 19th February, 1889.

So far as the by-law itself is concerned, all the objections which the plaintiff now makes to its validity, and in particular the insufficiency of the petition for the construction of the drain, were as well known to him months before it was passed as they were when he brought his action, and the case is pre-eminently one in which the plaintiff is bound to make out not only a clear and strong case of absolute want of jurisdiction on the part of the council, but to establish, in the face of his unexplained delay, that his own status or qualification to maintain this monstrous litigation is unaffected.

The precise ground on which the by-law was declared invalid by the Court below is that the work had not been petitioned for by the majority in number of the persons to be benefited thereby as required by section 570 of the Municipal Act. The petition was presented to the council on the 26th May, 1884, and as presented was sufficiently signed, but after the engineer's report upon the scheme a counter-petition was presented on the 25th August, 1884, which was signed by some of the signatories of the petition who thus withdrew from the latter, as it was said, and so converted the majority into a minority.

Then there was much dispute on the evidence whether some of those who had signed the counter-petition had not authorized their names to be struck off it, and so, it was said, reinstated the petition, and in the Court below the case ultimately turned on the question whether the plaintiff and John Makins, who had both signed the petition, and the latter of whom had signed the counter-petition, remained petitioners. Although the plaintiff had not signed the latter he had written a letter to the council on the 24th November, 1884, opposing the construction of the drain through his own farm on the ground of delay, and it was said that Makins' signature to the cross-petition had been erased with his assent. The Court held, reversing Meredith, J., who had tried the case on the evidence as reported, that the plaintiff's letter was a sufficient withdrawal from the petition, and that Makins' authority to the clerk to strike out his name from the cross-petition had not been established.

Judgment.

OSLER,
J.A.

The loss of these two names, it was held, left the petitioners for the works in a minority and invalidated all the subsequent proceedings of the council.

Now, as to this part of the case it appears to me, looking at the great length of time which was suffered to elapse before the plaintiff brought his action; at the magnitude and number of the interests which would be affected by its success; and at the fact that the works authorized by the by-law had long been completed and carried into execution; that every presumption should be made in favour of the regularity of the proceedings of the council, and that a petition at one time undoubtedly sufficient to confer jurisdiction, which they in fact acted upon, should not be reduced and their jurisdiction destroyed except upon the strictest proof of the withdrawal of the petitioners. As regards the right to withdraw I confess I had thought it was approved by our decision in *In re Robertson and North Easthope*, 16 A. R. 214. It was so decided by the late Chief Justice Sir Adam Wilson in 1882, in *Re Misener and Wainfleet*, 46 U. C. R. 457, upon the Municipal Act as it then stood: section

Judgment.

OSLER,
J.A.

529 of R. S. O. [1877] ch. 174. After that decision the law was twice re-enacted in the same terms, viz., in the Municipal Act of 1883, and again in the revision of 1887, before it was altered, and the right to withdraw regulated by the Act of 1890, 53 Vic. ch. 50, sec. 35 (O.), by adding a subsection to the section which had been construed in *Re Misner and Wainfleet*, and we may assume that the Court below were of opinion that such right existed, as they might have overruled that case, as being the decision of a single Judge, had they thought it wrongly decided, or not approved by *In re Robertson and North Easthope*, or that the construction thereby given to the section had not been affirmed by the subsequent legislation: *Nicholls v. Cumming*, 1 S. C. R. 395, 418. It is, however, needless to enter further into this part of the case for I am of opinion that the judgment of Meredith, J., as to the fact of the withdrawal of the plaintiff and Makins ought not to have been disturbed. The case is not one which depends upon the trial Judge's view of witnesses' credibility founded upon their appearance and demeanour, as neither Meredith, J., nor the Judges of the Queen's Bench Division, saw the witnesses but acted upon the evidence as reported. We are, therefore, in the same position as any judge who has passed upon the evidence to form an opinion upon it.

As regards the plaintiff himself I should set against his letter of the 24th November, 1884, which is not an absolute and complete withdrawal from the whole petition but is merely as to the continuing of the drain beyond a certain point therein named, not only his subsequent conduct in relation to the proceedings of the council but his notice of the 22nd April, 1885, in which, so far from objecting to the work or to the right of the council to pass the by-law and construct the drain, he expressly asks to be granted "the privilege of constructing the drain proposed by the said by-law from post 128 to the end of the drain in a way more satisfactory to himself."

There never was on his part an absolute and unconditional withdrawal, and the defendants were not bound

to notice any other. As to Makins, with all respect to the Court below, I think, having in view the considerations already mentioned, the evidence of the town clerk as to what he did at the time in striking out the name and vouching it as he then did by his initials ought rather to have been accepted than the evidence of Makins denying his authority.

Judgment.

OSLER,
J.A.

Then as to the right of the plaintiff himself to maintain the action. He might have moved to quash the by-law in a summary way on the ground I have referred to, in April, 1885.

The by-law had been duly published with the usual notice that any person intending to apply to have it quashed must serve notice to that effect upon the reeve, etc., within ten days after the passing thereof. On the 9th April, 1885, the plaintiff duly gave such a notice, but instead of following it up, served on the 22nd April, 1885, a notice expressly withdrawing it and requesting, as already mentioned, to be allowed to construct that part of the drain passing through his own farm according to his own ideas of how it ought to be made. Asked his reason for not moving against the by-law, he said:

“ Well, reading the by-law in the paper, from that I inferred that I could quash any portion of the by-law I wanted to; I went to Mr. Harding, my solicitor here, and he told me no, that I must quash the whole thing, spoil the whole scheme, and I did not want to do that.

You were satisfied to let the matter go on rather than have the whole by-law quashed? Yes, provided I was allowed to improve my outlet.

But anyway? No.

Why not quash the whole by-law? I did not want to deprive the others; I did not want to burst up the whole scheme; if the council would adhere to this letter and let me improve my own drain.

But if they would not, why did not you quash the whole? I did not want to.

Judgment.

OSLER,
J.A.

Why did not you want to? I have given you the reason a dozen times. I did not want to burst the scheme and deprive them of the drain.

Solely out of philanthropy? Not exactly.

What did you mean? I meant if they allowed me to make this drain myself."

This alone, it appears to me, must preclude the plaintiff, who is the only person objecting to the drain, from maintaining this action, for his consent was directly calculated to induce the council to suppose that their jurisdiction was not contested, and that there was nothing to prevent them from going on with the works as they at once proceeded to do. They advertised for tenders, and the plaintiff himself tendered for the works, at \$4,497, which were let, however, to a lower tenderer. Then, in 1887, not complaining that the council had exceeded their powers, he charges them with negligence in the execution of the works. In 1886, 1887, and 1888, he pays his taxes assessed for the construction of the drain, no doubt under protest, but in short, from first to last, including his appearance before the Court of Revision and opposing in the interest of the by-law the appeals from the engineer's assessment, his conduct has been that of a man who wished to have the by-law stand and the works constructed, but at the same time to have his own way as to how they should be done. I am of opinion that he cannot now be heard to impeach the by-law upon any ground which was open to him, four years before he brought his action, on the motion of which he gave notice and which he afterwards expressly abandoned. I refer to *Dillon v. Raleigh*, 13 A. R. 53, 14 S. C. R. 739; *Regina v. Cusac*, 6 P. R. 303, and cases there cited.

For these reasons I think that the appeal should be allowed, and there being no cross-appeal that the judgment of Mr. Justice Meredith should be restored. With regard to the case of *In re Robertson and North Easthope*, 16 A. R. 214, I may add that I adhere to the views expressed in the opinions delivered in that case ~~as~~

to the scope and effect of sections 292 and 293 of the Municipal Act, 1883 [46 Vic. ch. 18 (O.)], the same as 291 and 292 of the Consolidated Act of 1892 [55 Vic. ch. 42 (O.)].

Judgment.
OSLER,
 J.A.

MACLENNAN, J. A. :—

I agree with my brother OSLER.

Appeal allowed with costs.

EVANS V. KING.

Will—Construction—Estate Tail—"Issue"—"Fee Simple"—Shelley's Case—Intention.

A testator by the third clause of his will devised certain lands "to my son James for the full term of his natural life, and from and after his decease, to the lawful issue of my said son James, to hold in fee simple; but in default of such issue him surviving, then to my daughter Sarah Jane, for the term of her natural life; and upon the death of my daughter Sarah Jane, then to the lawful issue of my said daughter Sarah Jane, to hold in fee simple; but in default of such issue of my said daughter Sarah Jane, then to my brothers and sisters and their heirs in equal shares." By a later clause, the testator added: "It is my intention that upon the decease of either of my said children without issue, if my other child be then dead, the issue of such latter child, if any, shall at once take the fee simple of the devise mentioned in the third clause of my will:"—

Held, reversing the judgment of FERGUSON, J., 23 O. R. 404, that the clauses must be read together, and that, having regard to the latter clause, and to the direction that the issue of James were to take in fee simple, there was a sufficiently clear expression of intention to give James a life estate only to prevent the application of the rule in *Shelley's Case*.

THIS was an appeal by the plaintiff from the judgment of FERGUSON, J., reported 23 O. R. 404. Statement.

The question in issue was the construction of the will of one Andrew Hamilton, and the material clauses of the will are printed in the report below.

The learned Judge gave judgment in favour of the defendants, and the plaintiff's appeal was argued before

Argument. HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.,
on the 20th and 23rd of April, 1894.

J. Bicknell, for the appellant. As opposed to the judgment now in appeal, we have in our favour the judgment on the same will in *In re Hamilton*, 18 O. R. 195. The words "in fee simple" are words expressive of an unequivocal intention on the part of the testator that the children of the testator's son should take an estate in fee simple in remainder, and there is no rule of law which prevents effect being given to that intention: *Evans v. Evans*, [1892] 2 Ch. 173. The rule in *Shelley's Case* has been here misapplied. It should be used not for the purpose of ascertaining the testator's intention, but only for the purpose of giving effect thereto. It must be borne in mind that "issue" is a much more flexible expression than "heirs of the body." The course of descent of an estate in fee simple being different from that of an estate which must pass through all the lines of issue, the effect of these words was to change the course of descent and thus to create a new *stirps* from which to trace descent: 2 Jarman, 5th ed., pp. 1257, 1264, where the authorities are collected. The result arrived at below is only possible after striking out the emphatic words "in fee simple," used in many parts of the will, wherever they occur, and such a course is contrary to all canons of construction. The sixth clause throws some light upon the testator's intention, and the learned Judge was wrong in refusing to consider it. See on the general question: *Morgan v. Thomas*, 8 Q. B. D. 575; 9 Q. B. D. 643; *Montgomery v. Montgomery*, 3 Jo. & Lat. 47; *Kavanagh v. Morland*, Kay 16; *Bowen v. Lewis*, 9 App. Cas. 890; *Burnsall v. Davy*, 1 B. & P. 215; *Crozier v. Crozier*, 3 Dr. & W. 353; *Lees v. Mosley*, 1 Y. & C. Exch. 589. *Denn v. Puckey*, 5 T. R. 299, and *Frank v. Stovin*, 3 East 548, will be relied on by the respondents. These cases are founded on *Dodson v. Grew*, 2 Wils. 322, and this case has been misunderstood and misapplied as is pointed out by Lord St. Leonards in *Montgomery v. Montgomery*, 3 Jo.

& Lat. 47. The question is, whether successive estates are intended to be created or not. *Roddy v. Fitzgerald*, 6 H. L. C. 823, relied on below, is distinguishable by reason of the use of the special words. That case is explained in *Bradley v. Cartwright*, L. R. 2 C. P. at p. 523. There were no words of inheritance in that will following the devise to issue, but the gift over was relied on there to shew the intention to give the issue an estate of inheritance. Argument.

E. D. Armour, Q. C., and *W. S. McBrayne*, for the respondents. The devise should be construed as a devise to James and the heirs of his body, remainder to Sarah Jane and the heirs of her body, remainder to the brothers and sisters of the testator and their heirs. Unless this construction is adopted there have to be numerous executory devises, to which the Court only resorts in default of any other construction. "To A. and his issue," is equivalent to "to A. and the heirs of the body;" and the mere descriptive words "in fee simple," are inserted merely by an error on testator's part as to the effect of the previous devise. The attempted distinction of *Roddy v. Fitzgerald*, 6 H. L. C. 823, is not successful. In *Denn v. Puckey*, 5 T. R. 299, the words following the gift to issue altered the rule of descent and had to be rejected. In *Williams v. Williams*, 51 L. T. N. S. 779, *Montgomery v. Montgomery*, 3 Jo. & Lat. 47, was not followed. In every case a devise such as is here in question has been held to confer an estate tail unless failure of issue in the lifetime of the first taker is contemplated. In *Mills v. Seward*, 1 J. & H. 733, also, *Montgomery v. Montgomery*, was not followed, and the devise was construed to give an estate tail, though the technical words were sufficient to confer a fee simple. These were rejected because it was impossible to work that out with the previous gift. In *Hellem v. Severs*, 24 Gr. 320, the words "heirs and assigns for ever," were rejected as inconsistent with the previously disclosed intention. Unless there is a distinction between "heirs and assigns" and "fee simple," these cases are exactly in point. Here the limitation is

Argument. to issue "in fee simple," and that is not so strong as the use of the technical words "heirs and assigns." The words "in fee simple," are apparently used by the testator to describe an inheritable estate. Compare the sixth clause where the testator speaks of the daughter's heirs taking what he calls James's estate of fee simple. Clearly he was here speaking of an estate tail. From the sixth clause it also appears that the testator intended that the two estates should one day coalesce in the branch lasting longest, and an ultimate failure of either branch is contemplated. The respondents' construction would allow of cross-remainders, while the appellant's construction would not, and unless the words are construed to confer an estate tail this could not be. Then no matter how strong the words may be, describing the life estate, the rule in *Shelley's Case* applies. The same rule should apply to words describing the nature of the descent, and they must be rejected if inconsistent with the legal estate conferred by the technical words previously used. *In re Hamilton*, 18 O. R. 195, was an application between vendor and purchaser, and all that was decided was that the title was too doubtful to be forced on an unwilling purchaser.

J. Bicknell, in reply.

June 30th, 1894. HAGARTY, C. J. O. :—

Our long consideration of this case reduces the point of decision to this.

Do the words "to hold in fee simple," added to the gift to the issue, prevent the operation of the rule.

It would be most presumptuous on my part to say that I have a clear opinion on the many points discussed before us, after wearying my eyes over the large expanse of text book and case law, in the attempt to deduce some rule of general application.

Judge after judge has lamented the wondrous diversity of opinion and the clashing of legal decisions, and a very learned Lord, recently deceased, spoke of being "appalled" at the mass of conflicting authority.

Lord Eldon said in *Jesson v. Wright*, 2 Bli. 1, that his mind was overpowered by the cases and the subtlety of the distinctions between them.

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HAGARTY,
C.J.O.

The word "issue" is said primarily to mean "heirs of the body," but it is said to be a more flexible word, and will yield more readily to the intention of the testator to be collected from the will than the technical expression "heirs of the body."

Here we may read issue as his immediate heirs or children.

In 2 Jarman, 5th ed., p. 1265, the rule is stated: "It is also established, that the addition of a limitation to the heirs general of the issue will not prevent the word 'issue' from operating to give an estate tail as a word of limitation." Then comes a review of the cases for and against this question.

Again at p. 1268: "If the addition of formal words of inheritance will not prevent the word 'issue' from operating as a word of limitation, still less will informal words do so, though sufficient to carry the inheritance, such as 'all my interest,' or 'for ever.'"

At p. 1269, it is said that what Lord St. Leonards did say in *Montgomery v. Montgomery*, 3 Jo. & Lat. 47, was: "A devise to A. for life, with remainder to his issue, with superadded words of limitation in a manner inconsistent with a descent from A. will give the word 'issue' the operation of a word of purchase."

If the devise here be simply to A. for life, remainder to his issue (or children) in fee, and in default of issue then over, the authorities seem to be reasonably clear that A. has only a life estate: *Bradley v. Cartwright*, L. R. 2 C. P. 511; *Morgan v. Thomas*, 8 Q. B. D. 575, 9 Q. B. D. 643.

I gather from the much contested case of *Bowen v. Lewis*, 9 App. Cas. 890, that the division in the Lords, Lords Selborne and Bramwell on one side, and Lords Cairns, Blackburn and Fitzgerald on the other, was almost wholly on the meaning of the words of the obscure will, not on

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the doctrine involved in the acceptance of one version instead of the other.

I refer to the general statement of the law by Lords Selborne and Cairns. Lord Cairns says (p. 906): "The crucial question which your Lordships have to solve is this: 'Did the testatrix mean to give her estate to the children or child of Thomas (the devisee for life), in fee as purchasers?' "

Lord Blackburn refuses to adopt one proposed construction, viz., that the testatrix expressed an intention that on the decease of Thomas the fee should go to Thomas's children contingently, on being born, as joint tenants in fee simple.

Lord Bramwell, who was in the minority with Lord Selborne, said that the child of Thomas took in fee, and that Thomas was not tenant in tail.

Lord Fitzgerald held that Thomas's child did not take in fee.

The majority of the Lords held that Thomas took an estate tail, but evidently, as I read the judgments, had the construction been that the children took in fee, the decision would have been unanimous in favour of Thomas having only a life estate.

This judgment was delivered on August 4th, 1884.

On October 28th, in the same year, *Williams v. Williams*, 51 L. T. N. S. 779; 33 W. R. 118, was decided by Chitty, J. The devise was of real estate to her six nephews named, and all her title and interest therein, to be equally divided amongst them, share and share alike, and their issue after them, to and for their heirs, executors, administrators and assigns.

The learned Judge held that the six nephews took an estate tail, and that on the true construction of the will the word "issue" was a word of limitation, and that he must reject the words "heirs, executors, administrators and assigns." *Bowen v. Lewis*, 9 App. Cas. 890, is not referred to.

In the American edition of Hawkins on Wills, published

in 1885, this case of *Williams v. Williams* is cited at large in the notes, p. 195 (n) and a case of *Carroll v. Burns*, 108 Pa. St. 386, is also referred to.

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HAGARTY,
C.J.O.

The devise there was to the testator's three daughters, to have and to hold to them during their natural lives, and after their death then to the lawful issue of my said three daughters, and the heirs and assigns of such issue.

On a re-argument of the case before seven judges, four held that the daughters took an estate tail, the Chief Justice and two others, *contra*.

The case was most elaborately argued, and there was a very large citation of authority. One of the counsel was Mr. Gross, mentioned in the American edition of Hawkins as author of a work: "The rule in *Shelley's Case* in Pennsylvania."

On the whole, I have come to the conclusion that the son James took only a life estate.

BURTON, J. A. :—

I agree that the true question is, how are we to understand the word "issue," whether as a word of limitation, meaning issue indefinitely in a course of legal succession, or as a particular class of issue, such as children or issue living at a particular period.

I agree also with my brother Ferguson, that if the words "heirs of the body" had been used, or if we are compelled under authority to hold that the word "issue" here is to be construed "heirs of the body," it must have its legal construction and effect, or, as it has been well expressed, if words, which are technical words properly admitting of only one meaning, are used, it becomes necessary to shew affirmatively that the testator meant clearly to use them as words of purchase, or more correctly as words descriptive, not of all the descendants of the body, but of one definite class only of such descendants. It is not enough to raise a reasonable doubt whether he intended to use them as words of limitation or

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to shew a probable conjecture that he intended to designate children only by that phrase.

All the authorities, including the case in the House of Lords, agree that "issue" is a flexible word, and will be construed as a word of purchase or of limitation as will best suit the testator's intention to be collected from the whole will, and that it requires a less demonstrative context to shew such intention than when the technical words "heirs of the body" are used. It is not a technical word to which as a rule of law a particular signification is to be attached.

Accordingly words of superadded limitation which would not control the legal effect of the words "heirs of the body," have frequently been held to give the word "issue" the operation of a word of purchase.

My brother Ferguson having held that the word "issue" was equivalent to "heirs of the body," I can well understand his holding that the words of inheritance which follow could not be superadded; but I do not agree with him that the words "to hold in fee simple," are of less force or significance than "heirs and assigns for ever." At the time of the making of the will those words were amply sufficient to pass the fee. It is not questioned that if the words here had been "and after his decease, to the lawful issue of my said son James," stopping there, they would have come precisely within the rule in *Shelley's Case*, and would have created an estate tail in the first taker for want of an element always attended to, and all important to the position, namely, the want of a limitation of an estate of inheritance to the issue as purchasers, for if the estate be thereby kept in the line of the issue of the devisee, the necessity of enlarging the express estate for life ceases to exist.

In *Kavanagh v. Morland*, Kay 16, Vice-Chancellor Page-Wood refers to the case of *Montgomery v. Montgomery*, 3 Jo. & Lat. 47, in this way (p. 24): "If there be a devise to one for life, and then to his issue, with words of limitation superadded, as to his issue and their heirs, then the issue are considered to take as purchasers, and the whole estate is

given to them under these words of limitation." And he then proceeds : " Again, if there be a gift to the issue, and a limitation in the will with reference to them, which has the effect of giving to them the fee simple, then, if there be a gift over in case of dying without issue, the gift over affords no evidence of intention to justify the application of the rule in *Shelley's Case*, because the fee was in the issue, and the words, ' dying without issue,' are consequently held to mean only such issue as were before mentioned." And again (p. 26) : " In looking at a will of this kind, I must first consider whether, by the original gift to the issue, they take an absolute interest ; in which case there would be no necessity to imply an estate tail in the parent in order to prevent the gift over taking effect until a complete failure of the issue."

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BURTON,
J.A.

Now, although we are dealing with a will made before our Wills' Act, it is not, I think, unimportant to consider that the technical rule in reference to an indefinite failure of issue has been found to be so unsuited to the present age, that the Legislatures, both in England and in this country, have declared that words which formerly bore that construction shall not in future cases do so, but shall be construed to import a want or failure of issue at death, and that such a rule, therefore, at the present day, even in the case of wills before the statute, should not be relied on if upon examining the whole will it is reasonably clear that that could not have been intended.

I think, therefore, that we should endeavour to ascertain not the general and particular intent, giving effect to the general, which, as a general proposition, has been in recent cases objected to as being too vague and likely to lead in its application to erroneous results, but by an examination of the whole will to endeavour to ascertain the predominant intention, and to give effect to that intention unless prevented by some positive rule of law.

The learned Judge, considering that the case fell within *Roddy v. Fitzgerald*, 6 H. L. C. 323, has followed that decision ; but in order to do so, he felt himself compelled

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to hold that the words "to hold in fee simple," had no effect and must be rejected.

On the other hand, these words to my mind have a most important bearing in distinguishing this case from *Roddy v. Fitzgerald* ; and everything turns upon them.

It was one of the grounds mentioned by Lord St. Leonards in *Montgomery v. Montgomery*, 3 Jo. & Lat. 47, on which it would be held that the testator had declared that the heirs should take an estate by purchase entirely detached from and unconnected with the estate of their ancestor, where he says (p. 51): "The testator has superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he has given the estate, whereby it appears that those heirs were meant to be the root of a new inheritance—the stock of a new descent."

Lord Cranworth in delivering judgment in *Roddy v. Fitzgerald*, 6 H. L. C. 823, made the very trite, but very true, remark, (p. 871), that the decision of these cases is never very satisfactory because one cannot but feel that the real intention which the testator had in view is very frequently defeated instead of being carried into effect, and adds: "But the duty of the Court is only to interpret the language of the will, attending to certain well-known rules or canons of construction. Where the testator shows upon the face of his will that he must have used technical words in another than their technical sense, there is no rule that prevents us from saying that he may be his own interpreter. So any established course of construction must give way to a contrary intention plainly apparent upon the face of the will. But unless there is something apparent upon the face of the will to the contrary, technical rules and ordinary canons of construction must prevail."

Then after enumerating several provisions of the will and shewing that they were not sufficient to deprive the words of their ordinary technical meaning, he proceeds to shew by inference that if words of limitation had been superadded in that case the decision would have been different.

The will being made before the Wills' Act, the issue would only have taken life estates.

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J.A.

"It is impossible" he says (p. 873) "to say that this gift to the issue could carry the fee. There are no words of limitation superadded as there were in the case of *The King v. Marquis of Stafford*, 7 East 521." And Lord Wensleydale says expressly (p. 883): "There is no language of the testator in the present case to carry a fee to the issue," and he then refers to *The King v. Marquis of Stafford*, where there was an express limitation in default of appointment to the children and their heirs.

The case in the Court below had proceeded on the supposition that the issue would by law take a fee in default of appointment. I think, therefore, that the judgment in the House of Lords does not govern this case, where, under the superadded words, the issue might have taken a fee simple.

Not a word is found in any of the judgments of the learned Judges who gave their opinions to the House of Lords, and who even upon that case were equally divided in opinion, to indicate that if words of inheritance had been added in that case they would not have unanimously come to the conclusion that the first taker would have taken only a life estate; and as I have said, such would evidently have been the decision of the House itself.

I make the following extracts from those opinions :—

Baron Channell (p. 838): "It is not, I think, disputed that if the devise to the issue would give them an estate in fee, then the first taker would take a life estate only."

Baron Watson (p. 845): "The words of the will * * have no words of inheritance superadded, nor any word, such as 'estate,' so as to constitute a devise in fee to the children, if there be issue."

Baron Bramwell (p. 853): "It is admitted that a power to appoint lands in such manner, shares, and proportions as he shall think fit, gives a power of appointment in fee. But I cannot doubt that the devise in default of appoint-

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ment, is a devise of the same estate as might have been appointed, viz., an estate in fee, and consequently that the dying without issue, means such issue, viz., children."

Mr. Justice Crompton (p. 854): "I think that the authorities show that in cases of the present description, the question whether the word 'issue' is to be construed as a word of purchase or of limitation, depends on the question, whether an estate of inheritance is or is not given to the issue: Jarman on Wills, cc. 38 and 39."

And again (p. 857): "Here we have no words of limitation giving the inheritance to the issue, and no words descriptive of the quantity of estate, or imposing any pecuniary charge upon the issue which would have the effect of passing the fee."

Mr. Justice Williams, after quoting the proposition laid down in Jarman on Wills, that (p. 862): "Where words of distribution, together with words which carry an estate in fee, are attached to the gift to the issue, the ancestor takes for life only; and the rule is the same whether the fee be given by the technical word 'heirs,' or by such words as 'estate' occurring in the description of the subject of the gift," adds: "For I think it difficult to deny that where an intention appears on the will to give the issue a fee, the word 'issue' may well be construed to mean 'children' throughout the devise, and be regarded as a word of purchase, and the gift over 'on failure of issue,' to mean 'on failure of *such* issue, i.e., 'children.' But I cannot find any language of the testator in the present case which will carry a fee to the issue."

Mr. Justice Erle (p. 865): After referring to the words of the will and the power to appoint, adds: "The remainder therefore is to the children in fee by implication from the estate devised, without words of limitation."

Mr. Justice Coleridge said nothing contrary to this view, and seems to concede that if the issue had taken an estate in remainder in fee, he should have come to a different conclusion.

The House of Lords held that the mere power to appoint

without more, would not, in default of appointment, devise a fee simple to the issue, and *that*, if it be not presumptuous to say so, I should have thought the proper interpretation of that will. Here the fee simple is expressly given.

Judgment.

BURTON,
J.A.

Now, I quite agree that we have nothing to do with what was or was not the intention of the testator; what we have to do is to ascertain what is the meaning of the words which we find in this will, and for this purpose we must first look at every part of it.

If I had to say what was the intention of the testator, apart from all legal or technical rules, I should say, as Lord Bramwell said in that case, it was to benefit his children and grandchildren, and to insure that object by giving his children estates for their lives only, with no power of preventing the grandchildren from taking what was intended for them. But to give his son and daughter estates tail is inconsistent with that general intent, as it enables them to defeat the estates of the grandchildren.

When we come to examine the will, we find that in a previous paragraph he devised another lot to his other child.

[The learned Judge read the second and fifth clauses and continued:]

Here again he uses the word "issue," and in a way that can leave no doubt that children were intended; and as to this I may refer to what is said by Sir Edward Sugden, that it is a well settled rule of construction, never to put a different construction upon the same word when it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary.

[The learned Judge then read the sixth clause and continued:]

Whether there may or may not be any legal difficulty in carrying out the devise to the issue of Sarah, we need not trouble ourselves with. As stated by Mr. Justice Coleridge, in the case from which I have been quoting, *Roddy v. Fitzgerald*, 6 H. L. C. 823, at p. 867: "I know no better

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rule to act upon than to ascertain, as well as I can from the will itself, the general predominant intention of the testator, and to sacrifice such parts as irreconcilably clash with that. This rule," he adds, "stands upon undoubted authority, and upon the soundest common sense."

Can any one doubt what was the predominant intention here? If "issue" is construed to mean "children" throughout this devise, and it clearly does in some parts apply to children, every word of the devise will have effect according to its natural meaning; and, as said by one of those learned Judges, the disposition of the property will be consistent with rational affection and the law governing devises of land. There would then be:—

1st. The devise to James for life, which no doubt the testator intended.

2nd. The remainder in fee simple to James' children if living.

3rd. In default, to Sarah Jane for life, which is what has happened.

The case of *Roddy v. Fitzgerald*, was decided in 1858, and in 1882, the Court of Appeal in England considered the case of *Morgan v. Thomas*, 8 Q. B. D. 575, 9 Q. B. D. 643. Jessel, M.R., prefaced his judgment in that case by stating that although the words "during his natural life" may be sometimes disregarded, and have been disregarded in cases which come under the rule in *Shelley's Case*, they are words of great importance in considering a will, and must not be forgotten. The words following the devise for life, were "and after his decease to his issue and their heirs for ever, if any."

He then says (p. 645): "First, what does 'issue' mean? 'Issue' has a popular meaning, being often used in the sense of 'children,' and a legal or technical meaning, being used in the sense of 'descendants,' and the question is in which sense it is used by the testator," and he and the other members of the Court, consisting of the late Lord Hannen and Lord Justice Lindley, held that, being followed by the words "and their heirs for ever" the word "issue"

must be taken as a word of purchase ; and that the first taker had an estate for life only.

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BURTON,
J.A.

I quite concede that if the words had been " heirs of the body," instead of " issue," even though followed by words of inheritance, that would have had no effect in displacing the operation of the general rule, unless upon the whole will it was clear to a demonstration that the phrase was intended to mean children exclusively.

But here the word " issue " is used, which is a much more flexible term ; and the case of *Bradley v. Cartwright*, L. R. 2 C. P. 511, seems to confirm the view I have taken of the case in the House of Lords.

The language of the learned Chief Justice who delivered the judgment in that case is almost identical with some of the expressions I have used above in dealing with *Roddy v. Fitzgerald* ; but he proceeds (p. 523) : " Admitting fully the general effect that is to be given to the word ' issue,' it is yet liable to be controlled, if a contrary intention is to be collected from the terms of the will, and if it can be shewn to have been used in a less extended sense ; and looking to the whole of this will, and to the rules that have been laid down for ascertaining and for carrying into effect the intention of testators in the construction of wills, we think that in this case the words ' issue,' ' child' or ' children,' and the subsequent mention of ' issue,' when read in connection with the context, must be taken to have been used in the sense of ' children,' and to be words of purchase."

He then refers to *Jordan v. Adams*, 6 C. B. N. S. 748, in which the words " ' heirs male of the body,' were held to be restricted to ' sons ' by reason of a subsequent reference to ' their father,' as here we find the same word ' issue ' used, when the will directs that the issue shall take the share of the parent."

It is said that the decision in *Jesson v. Wright*, 2 Bli. 1, is opposed to the view for which I have been contending, but I do not think so. It proceeded on the distinct ground of the want of any words to carry more than a life estate to children considered as purchasers.

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BURTON,
J.A.

I ought not to close without referring to *Mills v. Seward*, 1 J. & H. 733, cited by the learned Judge. It seems to me to decide only what I have conceded, that when the words "heirs of the body" are used, the superaddition of other words of limitation such as "his or their heirs and assigns for ever as tenants in common," is not sufficient evidence that they were used in a special sense, so as to exclude the operation of the rule in *Shelley's Case*.

If "issue" in this case is construed to mean "descendants," and the words "in default of such issue him surviving," mean a general failure of issue, so that an estate tail is implied in James, what is in a technical sense spoken of as the general intention may be effected, but in truth every intention of the testator will be defeated; and, in the words of Mr. Justice Erle, the testator will be taken to have preferred unborn objects of unknown distance to living objects of natural affection.

I think there is abundant evidence upon the whole will that the term "issue" here meant "children," and the element which was wanting in *Roddy v. Fitzgerald*, 6 H. L. C. 823, is supplied.

There is no limitation here of a fee upon a fee. It is an alternative limitation to take effect if the prior limitation to the children fails, and in that event Sarah Jane takes a life estate in the land.

If this is wrong, as Lord Bramwell says, it has at least the advantage of being wrong on the right side.

With great respect, I think the judgment below is wrong from not giving effect to the words the learned Judge has rejected.

It is a strange thing that in *Roddy v. Fitzgerald*, in the Exchequer Chamber in Ireland, the ten Judges were equally divided, and the eight Judges who assisted the House of Lords were equally divided also. I have read these judgments with great care, and am of opinion that if these words had been in the will in that case there would have been no difference of opinion.

I have not overlooked the case of *Williams v. Williams*.

51 L. T. N. S. 779, referred to by Mr. Armour. The case is peculiar and turned upon the words of the will, where the estates were devised to six nephews to be equally divided to and amongst them, share and share alike, followed by the words, "and their issue after them, their heirs, executors, administrators, and assigns," and there was no division of the property. The learned Judge held that some effect must be given to the word "issue," and, as I understand it, treated it as equivalent to "heirs of the body," and he held that there was nothing to control their general effect, and, so construed, the words which followed were rejected as inconsistent with the previous devise, and so he held that the nephews took an estate tail. I do not think that case conflicts with those I have referred to.

Judgment.

BURTON,
J.A.

MACLENNAN, J. A.:—

During the argument and afterwards I was of opinion that my brother Ferguson's judgment was right, for the reasons which he has so fully stated, but further consideration, and discussion with my learned brothers, have led me finally to think that it is wrong.

After all there has been no other will like this, and probably there never will be; and while the decisions in other cases more or less resembling it give us general rules and principles of construction to guide us, none of them are conclusive; and what we have to do is to try to find out the true meaning of the words which have been employed by this testator in disposing of his estate.

The devise is "to my son James for the full term of his natural life, and from and after his decease to the lawful issue of my said son James, to hold in fee simple, but in default of such issue him surviving, then" over.

The first remark to be made is that there is a clear gift to James for life, which, as observed by Jessel, M. R., in *Morgan v. Thomas*, 9 Q. B. D. at p. 645, is of great importance in construing the devise. It is further to be remarked that the concluding words directing the estate to go over

Judgment. “in default of such issue him surviving,” seem to have no effect whatever upon the meaning of the previous gift:
MACLENNAN, *Doe v. Rucastle*, 8 C. B. 876, and 2 Jarman, 5th ed., p. 1284. They operate as an executory devise over upon a certain contingency, but they do not help us to determine whether “issue” means all the descendants of James, so as to confer upon him an estate tail, or only a limited class of such descendants, leaving him with only a life estate; for while he might leave no *children* him surviving, he might leave issue, for example, one or more grandchildren or great-grandchildren.

While the express gift to James is only an estate for his natural life, it is elementary that the following words down to, but excluding, the words “to hold in fee simple” would give him an estate tail, and the question is what is the effect of those following words? Are they consistent with the estate tail given by the previous words, and therefore harmless; or are they repugnant and to be rejected; or are they, while inconsistent with an estate tail, yet so consistent with an admissible sense of the word “issue” that full and rational effect may be given to the one and the other? If the true conclusion be in accordance with either of the first two alternatives the judgment ought to be affirmed; but if not, and if it must be in accordance with the last alternative, then James’s estate is no more than an estate for life, an estate in fee simple is given to his issue, and the judgment should be reversed. First, are the words consistent with an estate tail? Clearly not. Without the words the testator says: I give my son James an estate in fee tail; and then he says, to hold in fee simple. Who is to hold? If it be James, then the same person who is to take in fee tail, is to hold in fee simple. If it be the issue, then James is to have an estate in fee tail, but his issue are to hold in fee simple. The inconsistency is hopeless.

“To hold in fee simple” can mean but one thing, and it is impossible to reconcile them with an estate tail. Secondly, are the words repugnant? It is apparent from what has already been said that they are repugnant to an estate

tail. If the testator had said, I give James the property in fee tail in fee simple, both limitations could not stand; one of them would have to be rejected. Both expressions are equally clear, definite and unyielding in sense and meaning, and the only question would be, which was to stand and which to be rejected. Are the words in question, therefore, to be rejected? The rule on this subject, settled by many cases, is stated in 1 Jarman, 5th ed., p. 439, as follows: "The rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every attempt to give to the whole such a construction as will render every part of it effective." Therefore, rejection is to be the last resort; and is not to be resorted to unless it is impossible to give effect to all the words. I think effect can readily be given to them. We have a plain and unmistakable gift of an estate for life only to James, and an equally plain and unmistakable gift at his death to his lawful issue in fee simple. There may be a gift to issue; *Cook v. Cook*, 2 Vern. 545, was a case of that kind. It was a devise to the issue of J. S., and being before the Wills' Act, it was held that children and grandchildren took concurrently estates for life: 2 Jarman, 5th ed., p. 948. If there may be a good gift to issue of an estate for life, there is no reason why there should not be such a gift in fee simple, as there is here. Therefore, we have a gift to James for his life only; and a gift in remainder to his issue in fee simple, and full effect is given to all the words of the will. That being so, there is no ground on which we should be justified in rejecting any of the words.

Many cases establish that by the use of sufficiently plain words what would otherwise be an estate tail according to the rule in *Shelley's Case*, may be held to mean merely an estate for life in the first taker, and an estate by purchase in the issue; and I am at a loss to think of any clearer, stronger, or more powerful words which could be used by a testator than the words which have been used in this will. "To hold in fee simple" can have but one meaning, and here plainly it is the issue, and no one else

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MAOLENNAN,
J.A.

Judgment. that is to hold in fee simple. If the word "issue" were inflexible, and incapable of having its meaning modified by the context, or by explanatory words, it would be an end of the case. We should have to reject the words "in fee simple" as repugnant, as an attempt by the testator to change the legal character of the estate which he had given. *Morgan v. Thomas*, 8 Q. B. D. 575, 9 Q. B. D. 643, already referred to, is, I think, the latest case in which the context of the devise was held to establish that the testator used the word "issue" in the sense of "children." There the devise was to L. for life, and after his decease to his lawful issue and their heirs for ever, if any; and if he should die without leaving any children born in wedlock, then over.

Now while there are many cases deciding that the context shewed that "issue" when used in the manner used here, meant "children," so there are many other cases deciding that particular contexts are insufficient for that purpose. These cases are collected and classified in the treatises of Jarman and Theobald. The cases which at first seemed to me to govern this case, are those cited in 2 Jarman, 5th ed., at p. 1265, where he says: "It is also established, that the addition of a limitation to the heirs general of the issue will not prevent the word 'issue' from operating to give an estate tail as a word of limitation." The same rule is also stated by Theobald, 3rd ed., p. 319, with a citation of the same cases cited by Jarman and others, of which the most recent is *Williams v. Williams*, 51 L. T. N. S. 779. It appeared to me for a time, as it did to my brother Ferguson, that if words of limitation in fee, superadded to the word "issue," such as "with remainder to his issue and their heirs," were not clear and strong enough to exclude the application of the rule in *Shelley's Case*, the words of this will could not do so. It seemed as if the two expressions were equivalent, for a gift to a man and his heirs is the same thing as a gift to him in fee simple.

Further consideration has satisfied me that for the pre-

ent purpose there is a difference between the expressions. The word "heirs," while it is the appropriate technical word to express a fee simple when used in a certain way, does not itself necessarily mean a fee simple or an estate in fee simple. Its meaning depends on the context or connection in which it is used. It may mean children, executors, issue, or next of kin, when used in relation to personalty : 2 Jarman, 5th ed., p. 923 *et seq.* ; and it may mean heirs general, or heirs of the body, or heirs male or heirs female, in relation to realty ; and indeed, when used as a word of limitation, it is only historically that it can be said to have preserved any part of its essential meaning. A devise or grant to a person and his heirs is not a devise or grant to the heirs at all, but to the person himself ; and the word is merely the sign or mark of the highest estate known to the law.

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MACLENNAN,
J.A.

In *Dodson v. Grew*, 2 Wils. 322, there was a devise to a person for life, and after his death to his issue male and the heirs male of the body of such issue male ; and Wilmot, C. J., said that the superadded words meant only that they were not all to take at a time, but in succession ; and that they were not words of limitation. Now I think all the other cases in which the addition of the word "heirs" was held not to affect the gift in tail, were decided on the same principle, namely, that the word not being itself necessarily a word of limitation, was not used for that purpose, but for some other purpose not inconsistent with the estate tail which had been given.

The case is quite different, however, with the words used in this will. They can mean only one thing, and the meaning is plain. They say clearly that the issue of James is to take this estate at his death in fee simple, and if that is so James cannot take an estate tail. The case is as clear as if the testator had said by way of explanation that his meaning was that when James died all his descendants who were then living should take the property in fee simple as tenants in common : Hawkins, p. 72 ;

Judgment. 2 Jarman, 5th ed., pp. 1011, 1015; *Baldwin v. Rogers*, 3 D. M. & G. 649, 656.

MACLENNAN,
J.A.

In *Fetherstone v. Fetherstone*, 3 Cl. & F. 67, Tindal, C. J., expressing the opinion of the Judges of England, in a case in which the gift was "to W. F. and his heirs male," with words following which, it was contended, cut down the gift to W. F. to an estate for life, with remainder to his sons in tail, stated the rule of construction in that kind of case to be (p. 74): "That the first taker shall be held to take an estate tail where the devise to him is followed by a limitation to the heirs of his body except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it;" and at page 76, Lord Brougham, delivering the judgment of the House of Lords, specifies a number of phrases which would have the effect of cutting down an estate tail to an estate for life; and adds: "So again, if a limitation is made afterwards, and is clearly the main object of the will—which never can take effect unless an estate for life be given instead of an estate tail—here again the first words become qualified, and bend to the general intent of the testator, and are no longer regarded as words of limitation, which, if standing by themselves, they would have been." Now here it is impossible to give any effect whatever to the plain words "to hold in fee simple" without restricting James to an estate for life. That is, therefore, what I think a sound construction requires to be done; and by so doing we do no violence to any part of the language used, but on the contrary harmonize the whole.

I think, therefore, that upon the true construction of this devise James took an estate for life only, and not an estate tail; and that he having died without issue him surviving, the title went over to his sister for life.

I think the construction which I have put upon the devise to James is favoured by section six of the will, which declares the intention of the testator that upon the decease of either of his children without issue, if his other child should then be dead, the issue of the latter, if any,

should at once take the fee simple of both estates. That ^{Judgment.}
means that if one should die leaving issue surviving, and ^{MACLENNAN,}
then the other should die without doing so, the issue of the ^{J.A.}
first should take both properties in fee simple. That
result seems to be exactly the same as follows from what
I think to be the true construction of the other devises.

I think that the appeal should be allowed.

OSLER, J. A. :—

I am of the same opinion.

Appeal allowed with costs.

SMITH V. MCGUGAN.

Contract—Master and Servant—Wages—Damages—Agreement to Remunerate by Legacy.

Where services are rendered, not on a contract of hiring, nor gratuitously, but upon the faith of a promise to leave property by will, which the testator fails to perform, an action may be maintained against his representatives to recover compensation for the services in the shape of damages for breach of the previous promise.

The plaintiff brought the action against the executors of her grandfather's estate, alleging that for several years she had worked for her grandfather in consideration of his agreement to leave her by his will as much as any of his daughters. He left her by his will \$400, while to his daughters he left \$1,000 each, and she claimed specific performance, or in the alternative wages:—

Held, per HAGARTY, C. J. O., and BURTON, J. A.—That the plaintiff could not recover wages, but that the agreement being proved, she was entitled to recover damages for its breach, which would be, if the assets were sufficient, \$600.

Per OSLER, J. A.—That no more specific agreement was proved than that the plaintiff was to be remembered by the testator in his will, and therefore she was entitled to nothing beyond the sum left her by the will.

Per MACLENNAN, J. A.—That the agreement was proved, and that the plaintiff was entitled to recover as damages for its breach a sum equal to the amount given to the least favoured daughter, to be ascertained in due course of administration.

In the result the judgment of FALCONBRIDGE, J., in the plaintiff's favour, was affirmed with a variation.

Statement.

THIS was an appeal by the defendants from the judgment of FALCONBRIDGE, J., and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 24th of November, 1891.

J. M. Glenn, for the appellants.

J. A. Robinson, for the respondent.

March 1st, 1892. HAGARTY, C. J. O.:—

The claim as rested on the amended statement is that the plaintiff went to reside with her grandfather, and that he agreed if she would remain with him to be brought up in his household, and to work for him till his death or her marriage, he would provide for her by his will as amply as he would for any of his own daughters, etc., etc. That the

plaintiff did work faithfully for him up to her marriage is clearly proved, and she and her mother swear positively to the agreement, and that he frequently repeated to her, sometimes that he would do for her as one of his own daughters, at other times that he would leave her a share of the homestead; that she need not go to learn to sew as he would leave her plenty to get her sewing done for her; again, that when she complained of the hard work and wanted to hire out, that he said that he was going to give her a piece of land next to Axford's—the homestead on which he lived.

Her mother swore much to the same effect.

Another witness said that the deceased told him he had given her fifty acres of land joining Axford's place.

When she married, the deceased gave her an outfit like what his daughters got, valued from \$125 to \$200. About a month before her marriage he made his will leaving her \$400.

Throughout the case there is no mention or suggestion of any contract, express or implied, as to the plaintiff having any wages. Her services seem to have been rendered wholly on the faith of a provision being made for her by will to place her on the same footing as his own daughters.

The learned Judge directs specific performance of the agreement, which he holds to be proved, or alternatively that she be paid the value of her services, which he assesses at \$1,000, less the \$400 left by the will.

From the formal judgment entered, I make the following extracts:—

“1. This Court doth declare that Neil McGugan, deceased, made an agreement with the plaintiff whereby he agreed to leave her by his will as much as he would leave to any of his own daughters, and that the said agreement should be specifically performed by the defendants, the executors of the will of the said Neil McGugan, deceased.

2. And this Court doth further declare that the plaintiff is entitled, under her prayer for alternative relief, to the sum of \$1,000, as for wages due from the said Neil McGugan, deceased to her.

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HAGARTY,
C.J.O.

Judgment.

HAGARTY,
C.J.O.

3. And this Court doth order and adjudge that it be referred to the Master of this Court at St. Thomas, to make all necessary enquiries, and take accounts for the purpose of ascertaining the amount to which the plaintiff is entitled under the said agreement.

4. And this Court doth further order and adjudge that the defendants do forthwith after the making of the Master's report pay to the plaintiff what shall be found due to her out of the property of the said Neil McGugan, deceased, come to the hands of the said defendants to be administered.

5. And this Court doth further order and adjudge that the said defendants do pay to the plaintiff her costs of this action out of the property of the said Neil McGugan, deceased, come to the hands of the said defendants to be administered."

I hardly see how this alternative direction is upheld. Should not the plaintiff have been called on to elect in which shape her claim was to be enforced, as was done in *Walker v. Boughner*, 18 O. R. 448? No reference would seem to be necessary if her claim is for \$1,000, less the \$400 bequeathed by will.

As to a claim for wages, I hardly see how it can, on the evidence, rest on any contract, express or implied. As already shewn it is rested entirely on services rendered on the promise of property left by will. She could at any time have left his service, as is suggested in *Alderson v. Maddison*, 8 App. Cas. 467. She could not have maintained any action against him, as I think, during his lifetime for services. He could on evidence such as she here gives to support her present claim have answered, that her remuneration could only accrue on his decease.

If there had been any evidence of an original hiring, so that the relation of master and servant once existed between him and his grandchild, and by subsequent arrangement it was settled that, in lieu of wages, he was to make this testamentary disposition, I can understand the force of the argument, that as his proposed method of payment,

or compensation, had failed by his default, the claim for payment as for services should be upheld.

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HAGARTY,
C.J.O.,

If he had died insolvent, she would lose the value of her services, just as if she had allowed her wages to accumulate, as she thought, in his hands. So it would be, if his estate could only pay \$100 to each of his daughters. She trusted, it is argued, to his fulfilling his promise, and to his ability to perform it. If he died without leaving any daughters, a difficulty would also arise.

I think that there is nothing in the evidence to authorize a finding that there was any contract, express or implied, of hiring, and I am unable to agree to the doctrine, that if such an agreement as the present is not sufficiently proved so as to be specifically performed, that still there can be a recovery as for the value of the plaintiff's services.

In our own Courts, see *McClarty v. McClarty*, 19 C. P. 311; *Morris v. Hoyle*, 28 C. P. 598.

In England, *Osborn v. Governors of Guy's Hospital*, 2 Str. 728.

There is a short note of this case before Raymond, C. J. It is said that the services rendered to the deceased, looked strongly as if the plaintiff did not expect to be paid, but to be considered in the will. The Chief Justice directed the jury that if that was the case they could not find for the plaintiff though nothing was given to him by the will; that they should consider how it was understood by the parties at the time of doing the business, and said that a man who expects a legacy cannot afterwards resort to his action. This case is approved of by Tindal, C. J., in *Baxter v. Gray*, 3 M. & Gr. 771. He says: "If the evidence had shewn that the work were done upon an understanding between the parties, that the plaintiff was to be remunerated by a legacy, that would have amounted to an agreement that he was to make no charge. But if the work or labour were performed under a hope of a legacy, I see no reason why the plaintiff should not, on such hope failing him, be, as it were, remitted to his legal right."

Le Sage v. Coussmaker, 1 Esp. 187, before Lord Kenyon,

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is to the same effect. He says: "The law is well settled, that if the plaintiff had undertaken the several services proved, without any view to a reward, but with a view to a legacy, he could not set up any demand against the testator's estate, but of that the jury were to decide." They found for the plaintiff, six hundred pounds; the will had given him a legacy of four hundred pounds.

The American cases seem to take a more liberal view, and to favour the view that if the promise to remunerate or provide by will fail, the plaintiff may recover the value of his services as a creditor of the estate. In *Martin v. Wright's Administrators*, 13 Wend. 460, the Court held that the evidence shewed that the services rendered were never intended to be gratuitous. In *Robinson v. Raynor*, 28 N. Y. 494, services were rendered by a son to his father, in pursuance of a mutual understanding that compensation should be made by will, and the father made several wills devising the homestead to the son. He died intestate, having destroyed his last will. The Court held that the fact of the failure to carry out the understanding entitled the son to compensation out of the estate for his services. In *Shakespeare v. Markham*, 10 Hun 311, at p. 326, the Court said, that the true rule in such cases, especially when based upon weak and vague parol arrangements, is to be found in *Martin v. Wright's Administrators*, and *Robinson v. Raynor*, and that the claimants would only be entitled to recover for the actual value of the services, as upon a *quantum meruit*.

My strong impression is, that unless the plaintiff has proved a contract, so specific that it can be legally performed, or for the breach of which damages can be recovered, that she cannot on that account fall back on a claim for services on a *quantum meruit*. I think that the evidence is clear that at no time did the relation of master and servant exist between her and her grandfather. If, as already noticed, the service began as a service of hiring, as in *Alderson v. Maddison*, 8 App. Cas. 467, and the relation being established it was then arranged that the ser-

vices should be remunerated by testamentary bequest, I think we could safely hold that they must be paid by the estate, according to their value, as the means proposed by the deceased had failed of accomplishment.

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HAGARTY,
C.J.O.

I feel the difficulties attending a case of this character. The plaintiff's evidence, as to what took place when she was eighteen or nineteen, and she wished to learn to sew, and to go out to hire, and as to the deceased's promises then made as to leaving her enough to pay for her sewing; and again that he would leave or give her a piece of land off the homestead, and evidence of others to whom he said he had given her fifty acres, were all urged against the truth of there being a specific existing contract between them. But I am not prepared to hold that all this is to negative the existence of the bargain so positively sworn to, and found proved to the satisfaction of the trial Judge. I may doubt whether I could have so held.

It may fairly be assumed that it was never intended that plaintiff's services were to be given gratuitously, but were to be remunerated in some shape.

I think the law permits a recovery for breach of such a contract fully performed on the plaintiff's part. We are not embarrassed by any question as to the Statute of Frauds, as it is not pleaded here, even if it could be a defence.

The case of *Walker v. Boughner*, 18 O. R. 448, seems almost exactly like this case in its facts. The Court there held that the agreement was not sufficiently proved, but allowed a recovery for the services. I do not think this case can be so dealt with.

Such cases may be referred to as *Logan v. Weinholt*, 7 Bli. N. S. at p. 53; *Fitzgerald v. Fitzgerald*, 20 Gr. 410; *McDonald v. McKinnon*, 26 Gr. 12; *Halloran v. Moon*, 28 Gr. 319; *Campbell v. McKerricher*, 6 O. R. 85.

I see no reason for a reference unless desired by the defendants. Assuming the assets of the estate to be ample to meet this claim, the damages can be assessed at \$600.

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HAGARTY,
C.J.O.

I have given this case much consideration, and have not arrived at the present conclusion without some hesitation.

My individual opinion is, that full justice was accorded to the plaintiff in her treatment by deceased.

BURTON, J. A. :—

I am of the same opinion.

OSLER, J. A. :—

It is a matter of the first importance, that Courts should not give effect to verbal agreements and understandings affecting the estate of a decedent, and altering the disposition he has made of it by his will, unless the evidence in support of them is of the most clear, consistent and cogent character, establishing them in all important details and particulars.

And where a claim is made by a member of the deceased's family, who has been in fact provided for in his will, but who is dissatisfied with such provision, and attempts to set up a verbal agreement or understanding controlling and enlarging it, I think a very dangerous precedent would be set by giving effect to such evidence as was given in support of the plaintiff's claim in the present case.

That the plaintiff served her grandfather faithfully, and that her services were probably worth what she has been awarded, has hardly been denied.

It has also been satisfactorily proved that they were not rendered by her gratuitously, and simply as a member of the deceased's family, brought up in his house under circumstances in which the payment of wages, or other reward for her services, was not contemplated by either party. I think it was intended by her grandfather, and that the plaintiff was led to expect, that she would be remembered in his will, and that her services would be compensated in that manner. She has been bequeathed a substantial legacy, though not equal to those bequeathed to her mother

and aunts, the daughters of her grandfather, but she contends that she was to be placed on the same footing with them, and that she should have received, as they did, \$1,000 instead of \$400.

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OSLER,
J.A.

She puts her case, however, upon four or five different agreements.

[The learned Judge then considered the evidence at length, and continued :]

Altogether the evidence impresses me as utterly insufficient to prove the agreement relied upon, that the deceased would leave the plaintiff any definite or ascertainable share of his property. In that respect the case is not unlike the case of *Walker v. Boughner*, 18 O. R. 448, which it also resembles in this, that the plaintiff is shewn to have rendered her services in the expectation and on the promise that she should receive compensation therefor by the testator's will. Further than this, I do not think the evidence ought, judicially, to be regarded as going.

The case differs from the case just cited in this that by the will of the deceased some provision is made for the plaintiff, not as much perhaps as she expected, but far from an illusory provision. With that I think she must be satisfied, for as she is compensated in the manner in which she was to be compensated, that is, by means of a substantial testamentary bequest, there is no room for the application of the principle on which, in *Walker v. Boughner*, 18 O. R. 448, the Court found a way to relieve the plaintiff, so that her services should not go entirely unrewarded.

With great respect, I think the only judgment the evidence warrants is a dismissal of the action.

MACLENNAN, J. A. :—

I have hesitated much in this case in consequence of the different view of it taken by my brother Osler, but I have been unable to bring myself to the conclusion that the judgment is substantially wrong. I do not see that any

Judgment. amendment of the original statement of claim was necessary. It alleged that the testator had agreed to remunerate the plaintiff's services by making the same provision for her by his will as for his own daughters but had not done so. If that is proved, the plaintiff is entitled to damages for the breach of the contract by the testator, the measure of which is the smallest sum which he gave to any one of his daughters in his will. I see no reason why such a contract, if made for sufficient consideration, should not be good, although perhaps it might be altogether defeated by intestacy, or by the disposition of all of his property in his lifetime. The validity of such a contract seems distinctly recognized by the Lord Chancellor in *Logan v. Weinholt*, 7 Bli. N. S. at p. 53, referred to by the learned Chief Justice.

MACLENNAN,
J.A.

In the case of a breach of such a contract the remedy is not by specific performance ; for that is impossible, the testator being dead. It is simply an action at Common Law for damages.

My difficulty in agreeing with my learned brother is that the learned trial Judge has found the contract proved as alleged. To differ from that finding I must see that he is clearly wrong, and I cannot say that he is.

The plaintiff and her mother state the contract differently, but their evidence is not contradictory or inconsistent. The difference really favours the truthfulness of both, as indicating the absence of concert to tell a concocted story. If I had heard them give their evidence, as the learned Judge did, and if I was convinced of their sincerity, I do not see why I should not have found the mother's statement of the contract to be the true one just as he did.

The plaintiff says the testator's promise was that he would do for her as one of his own daughters. In cross-examination she twice repeats it in the same terms, with slight and immaterial verbal variations. If that had been the promise, I think we could not hold that there had been any breach, for he has done for her as one of his own

daughters. He sent her to school. He gave her a marriage outfit, and a legacy. He does not give to her as large a legacy as to his daughters, but the promise as stated by her did not go so far as that. He was merely to do for her as a daughter.

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MACLENNAN,
J.A.

But her mother says the promise was "I will leave her the same in my will, as I will leave any of my own daughters," and she adheres substantially to that throughout her evidence. If that was the promise, it goes further than the other, but is not necessarily inconsistent with it, and it requires that the plaintiff should be provided for as well at all events as the least favoured daughter. If we are sure that there was some bargain, by reason of which the plaintiff was serving, and that I think cannot be doubted at all, I think the mother's account of it is distinctly corroborated by the evidence of the two witnesses John McGugan and James Snow. The former says his father, the testator, told him he would "leave her as well as any of his own daughters—leave her as much as one of his own daughters," and the latter, that he had told him he was going to "treat her as one of his own daughters."

I do not think this evidence is weakened by the circumstance, that the testator did not refer to any agreement in saying what he did to these witnesses. The agreement being proved independently, what he said he was going to do must be referred to it.

Neither do I draw a conclusion unfavourable to the agreement, from what the plaintiff says passed between her and the testator at different times about giving her land, etc. That was before he had made his will, and one of the ways by which he might have thought of putting her in a position of equality with his daughters, was by giving her land, of which great part of his property consisted.

So, too, I can attach but little weight to the plaintiff's statement that she was at liberty to leave at any time, and that she had wanted to go, and remained in consequence of his promises, etc. No doubt she could have left, and the

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J.A.

only consequence would have been she would have lost the benefit of the agreement; and the severe labour she was performing might well lead her to doubt whether it would not be better to go, even if she lost all. But the end of it was the promises were renewed, and she was persuaded to remain.

I agree that such claims as this, where they are brought forward, should be jealously watched and scrutinized by the Court, but the law does not forbid such bargains, nor require them to be in writing, and when one is proved to the satisfaction of a judge, it is his duty to give effect to it just the same as if it were in writing, and as I cannot see that the learned Judge was wrong in finding the agreement proved, I think the judgment should be affirmed.

I do not think the Statute of Frauds applicable to an agreement of this kind, which is not concerning lands or any interest therein. Nor can the Statute of Limitations apply for the breach of the contract occurred at the testator's death.

I think, however, the judgment is wrong, in point of form, and that what the plaintiff is entitled to is a sum equal in amount to the legacy given to the least favoured daughter, to be paid in a due course of administration, instead of the legacy of \$400 given to her in the will. The learned Judge might have assessed the sum to be paid as damages, but not having done so, the defendants are entitled to a reference, if they desire it, to fix the amount, unless the parties can agree upon it. In either case it will be paid like a debt, in due course of administration, but subject to abatement as if it had been a legacy.

Appeal dismissed with costs,
*OSLER, J. A., dissenting.**

* On appeal by the defendants to the Supreme Court of Canada, this judgment was affirmed: 21 S. C. R. 263. The certificate of the judgment of this Court was issued without the variation directed to be made in the form of the judgment in the Court below, viz., by striking out that part of it relating to specific performance, and the Supreme Court directed this to be made.

GOSNELL V. TORONTO RAILWAY COMPANY.

Toronto Railway Company—Ways—Excessive Speed—Negligence.

The Toronto Railway Company have not, under their charter and their agreement with the city of Toronto, an exclusive right of way upon their tracks or the right to run their cars at any rate of speed they please. Whilst their cars must not be wilfully impeded, they are bound to recognize the rights and necessities of public travel and so to regulate the speed that the cars may be quickly stopped, should occasion require it.

Where, therefore, there was some evidence that an accident was the result of a car running at excessive speed, the judgment of the Common Pleas Division, upholding a verdict against the company, was affirmed.

THIS was an appeal by the defendants from the judgment of the Common Pleas Division. Statement.

The plaintiff while driving a waggon along Yonge street in the city of Toronto, attempted to cross the car track in order to pass another waggon in front of him, and his waggon was run into by an electric car of the defendant company, and he was seriously injured. He then brought this action, which was tried at the Toronto Fall Assizes of 1893, before STRKET, J., and a verdict was found in his favour.

There was much contradictory evidence as to the mode in which the accident occurred, and also as to the rate of speed at which the electric car was being driven, which it is not necessary to set out in detail.

The verdict in favour of the plaintiff was upheld by the Common Pleas Division, and the defendants' appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 29th and 30th of May, 1894.

Osler, Q.C., and Laidlaw, Q.C., for the appellants. The judgment of the Court below in favour of the plaintiff has proceeded on an entire misapprehension as to the position of these defendants. A street railway stands in an entirely different position from an ordinary railway using locomotives propelled by steam, and the same principles of

Argument. law cannot be applied to the former. Here, moreover, the railway has by its Act of Incorporation and its agreement with the city special rights which have not been given effect to by the present judgment. The appellants are quite outside the principles of the common law as to speed. They have an absolute right of way, and so long as under the terms of the agreement the city engineer does not restrict the rate of speed the defendants can run at any rate that they see fit to use. The electric service was introduced for the purpose of obtaining speedy transport, and speed *per se* can not be negligence. The remarks as to speed in *Follet v. Toronto Street R. W. Co.*, 15 A. R. 346, have been relied on by the plaintiff, but in that case it was shewn that there was an inexperienced driver, and that there was failure to stop within a reasonable time, and the actual decision is strongly in favour of the appellants. *Ewing v. Toronto R. W. Co.*, 24 O. R. 694, is against the appellants, and is, we submit, not good law. Among the authorities that bear most closely upon the question in issue may be mentioned *New York, etc, R. W. Co. v. Kellams*, 32 Am. & Eng. Ry. Cas. 114; *Hannibal, etc., R. W. Co. v. Young*, 19 Am. & Eng. Ry. Cas. 512; *Carson v. Federal, etc., R. W. Co.*, 50 Am. & Eng. Ry. Cas. 462; *Winter v. Federal, etc., R. W. Co.*, 153 Pa. St. 26; *Patton v. Philadelphia Traction Co.*, 132 Pa. St. 76; *Thomas v. Citizens Passenger Co.*, 132 Pa. St. 504; *Will v. West Side R. W. Co.*, 84 Wis. 42; *Powell v. Missouri, etc., R. W. Co.*, 8 Am. & Eng. Ry. Cas. 467; *Christensen v. Union Trunk Line*, 32 Pac. Rep. 1018; *Barker v. Hudson River R. W. Co.*, 4 Daly (N.Y.) 274.

Fullerton, Q. C., for the respondent. It clearly appears from the evidence that the cause of this accident was the excessive rate at which the car was being driven, and this excessive rate of speed was quite sufficient evidence of negligence to justify the case being submitted to the jury. The defendants cannot be in any better position than if they were running on a road owned by themselves, and in cases of that kind it has been held that the rate of speed is a matter for consideration by the jury. See, for instance,

Davey v. London and South-Western R. W. Co., 12 Q. B. D. Argument. 70; Beven's Law of Negligence, p. 125. The contention that the defendants have an absolute right of way, and that any person crossing, or driving on the track, does so at his own peril is not well founded. The Act and the agreement give the defendants, it is true, a paramount right of user of the track allowance, but this simply means that they are entitled to compel any persons on the track to get out of the way so as to avoid delaying the cars, and they certainly do not give them the right to run persons down. In the very cases cited by the appellants it is pointed out that while the rate of speed in itself is not, perhaps, evidence of negligence, it becomes evidence of negligence if the rate is such that there is a possibility of not being able to bring the car under speedy control. There was evidence here that no attempt was made to slacken speed, and that in fact the plaintiff's waggon was deliberately run into. The principles governing such a case as this are well pointed out in *Smith v. Browne*, 28 L. R. Ir. 1; *Ruddy v. London and South-Western R. W. Co.*, 8 Times L. R. 658. The rate of speed must be considered in connection with the surrounding circumstances, and the jury are entitled to say having regard to the rate of speed and to these circumstances that the defendants were or were not guilty of negligence: Beven's Law of Negligence, p. 11.

Laidlaw, Q. C., in reply.

September 11th, 1894. HAGARTY, C. J. O. :—

It is with very great reluctance that I can concur with my learned brethren in dismissing this appeal. It is quite true that of late years the appellate Courts especially will not interfere on the weight of evidence.

Apart from the question of the rate of speed the plaintiff on his own shewing ought certainly not to have recovered, as he admits that he turned into the track without looking back to see if any car was near him, and the collision would have happened if the rate of speed was one-half less

Judgment.

**HAGARTY,
C.J.O.**

than sworn to. Except on the evidence of one witness who swore that the car was going at the rate of thirty miles an hour, there was no case, I think, for the jury.

I agree that we cannot accede to Mr. Osler's argument that as the company has the right to the track, the rate of speed at which they travel is immaterial. To rush along Yonge street at any rate of speed like what this witness swore to, must naturally strike one as most dangerous, and in a case like this renders it necessary to leave it to the jury as an important element in the charge of negligence. This witness's statement is wholly at variance with the evidence of several other witnesses, and a perusal of the whole testimony leaves, on my mind at least, an unhesitating belief of its incorrectness.

Under the old system of our Courts I think it probable in a case like this the defendants would, on payment of costs, have been allowed a new trial. I must, however, admit that the practice of late years has been against interference with a jury's decision where there was evidence, however strongly rebutted and contradicted, to warrant the finding.

BURTON, J. A. :—

In affirming the judgment of the Divisional Court I should not have deemed it necessary to accompany that affirmance with any remarks but for the contention of the defendants' counsel—renewed before us—that the company under its charter and the agreement, which is now part of its statutory charter, has the right to run its cars at any rate of speed, and that the public having also a right to the use of the streets must use them in subordination to that superior right of the railway, and at their peril in the event of their crossing or driving along its tracks.

It is quite true that under the law, and if we are to have fast travel from the necessity of the case, the company must have a right of way on that portion of the street on

which it alone can travel paramount to that of ordinary vehicles—but it is not an exclusive right. The owners or drivers of other vehicles must give way, and are not justified in impeding the cars of the company, and are liable to penalties when wilfully doing so ; but the public still has a right to the ordinary use of the streets, and the company under its charter, whilst entitled to the priority of the right of way, cannot unnecessarily impair or lessen the right of the public who have still the right to drive along or across the tracks if they use due diligence not to interfere with the passage of the cars.

Judgment.

BURTON,
J.A.

Notwithstanding the very broad and general language of the company's charter, they are bound to recognize the rights and necessities of public travel, and to notice the presence of other vehicles or of pedestrians, and so to regulate the speed of the car that it may be quickly stopped should occasion require it.

On the other hand the driver of a carriage or other vehicle is bound to use ordinary diligence when crossing or driving upon the tracks of the railway, and to look up and down the track before entering upon it, and to turn off and allow the cars to pass without hindrance or slackening of the ordinary speed.

This being the law it seems to me impossible to say that it was not properly left to the jury to find whether there was any negligence on the part of the company in driving at an excessive rate of speed when approaching the plaintiff's waggon ; and, on the other hand, whether the plaintiff was not guilty of negligence in omitting to look up the track before venturing upon it, but these were questions for the jury ; the learned Judge could not take it upon himself to decide either of these questions. Had I been upon the jury I question whether I should have arrived at the same result.

In actions of this kind the law is the same whether the damage has been caused by a railway train, a carriage in a crowded street, or a waggon on a country road. The difficulty is in its application, and there is no more fruitful

Judgment.

BURTON,
J.A.

source of fallacy than where a judge seeks to apply to the case before him a similar act or omission occurring in other circumstances or under different conditions as amounting to negligence.

We were referred to *Follet v. Toronto Street R. W. Co.*, 15 A. R. 346, as similar to the present, where the majority of the Court were of opinion that the plaintiff had proved herself to be the cause of the injury, but it was very near the line, and one of the members of this Court thought it was a question for the jury.

Thomas v. Citizens' Passenger Co., 132 Pa. St. 504, was very like that case, and it went to the jury, who found for the plaintiff, but the verdict was afterwards reversed, the Court holding that the burden of proof was upon her, and that she had failed to establish a state of facts from which negligence could be fairly inferred, whilst it was proved by her own evidence that she had been guilty of negligence, which was the principal, if not the sole cause of the injury.

I think that the case could not have been withdrawn from the jury, and whilst I think their finding open to some doubt, they were the proper tribunal to dispose of the facts, and the position of the defendants as to the rate of speed is not tenable.

OSLER, J. A.:—

I agree in dismissing the appeal. Granting that the statute gives the defendants the right of way it does not give them the exclusive right of way or the right to run their cars along the streets at any rate of speed they please without regard to the rights the public also have in the use of the streets. Nothing has made it unlawful for other vehicles to travel upon the track, across it or lengthwise. The company's right cannot be compared to that of an ordinary railway company propelling its trains along its own railway track. It has "the exclusive right to the track over which its cars are passing, but its right is not other-

wise exclusive. Other carriages must keep out of the way of the cars, and if they are hit, when the latter are proceeding at a reasonable and lawful speed, and with all such care as, considering the subject, can reasonably be used, they cannot maintain an action against the company. But they have no right to drive immoderately, and it is in the highest degree dangerous for them to do so. * * It is not unreasonable for the private traveller to assume that the railroad car will be driven moderately and prudently. He can calculate distances and the time required to effect his own change of position, in order to prevent injury in such cases :” *Hegan v. Eighth Avenue R. W. Co.*, 15 N. Y. 380.

Judgment.

OSLER,
J.A.

On the facts in the present case I have only to say that there was some evidence for the jury that the cars were going at an unreasonable rate of speed, whether the higher or lower rates deposed to by the plaintiff’s witnesses be adopted.

Possibly I should not have taken the same view as the jury has done, considering how enormously difficult it is for an ordinary passenger or spectator to judge of the rate at which a train of cars is going. Nevertheless this will not justify us, as the law now stands, in interfering with the verdict based upon evidence which the jury might adopt, if it commended itself to their judgment.

The appeal must be dismissed.

MACLENNAN, J. A. :—

I agree.

Appeal dismissed with costs.

Judgment.

BURTON,
J.A.

been that of manslaughter, or something little removed from accident, when all intent to bring about the death, and thereby bringing about the existence of the fund for the profit of the criminal, was necessarily absent. It is true the language of some of the judges in that case is very general, as if extending to any criminal act, but the language must be restricted to the particular facts with which they were dealing. The following passage from Lord Justice Fry's judgment seems to me to furnish the key note to the decision: "If no action can arise from fraud, it seems impossible to suppose it can arise from felony or misdemeanour."

It appears to me that the crime must be of such a character as to shew an intent to bring about the result, and the result having been thus brought about the criminal cannot derive a benefit from it.

A party seeking to enforce a contract brought about by his own fraud, cannot recover, because he would be profiting by his own wrong; so a party who intentionally kills another cannot profit by that act. But would such a rule apply where a person accidentally kills his most intimate friend, but under circumstances which bring him within the criminal law because he was negligent? I cannot believe such to be the law and I shall refuse so to decide until compelled to do so by some higher authority.

But it is not necessary to go so far in this case; this question is not whether the Court will lend its aid to enforce payment of a fund brought into existence by the intentional crime of the claimant, but whether the law of descent can be altered by reason of a man being convicted of a crime of this nature.

If, for instance, a person kills his ancestor under circumstances that might subject him to a conviction for manslaughter, is he in consequence unable to inherit?

That, I think, does not differ in principle from the present case. The convict here was named as devisee under his wife's will. The conviction shews that there was no malice aforethought, no intent to bring about the result; for all

that is before us, it may have been mere neglect or the result of a fit of drunkenness without criminal intent of any kind, and there are no degrees of manslaughter recognized by law.

Judgment.
BURTON,
 J.A.

The case differs wholly from the *Cleaver* case. Here the estate descends by operation of law and by virtue of the devise, and cannot be affected by a conviction which, if held to avoid the devise, would do so although the conviction was one of so trivial a character and so free from moral culpability as to call for the most trifling punishment.

I think that the appeal should be allowed.

OSLER, J. A. :—

The doctrines of the law relating to escheats and forfeitures do not throw much light upon the principal question to be decided in this case. Those doctrines are applied in order to determine or take away an estate already vested in the criminal, whereas here a declaration is sought that the estate has never vested in him at all, because the will upon which he relies has, under the circumstances, never come into operation. The plaintiffs are not setting up that by his conviction for felony J. B. Lundy forfeited or lost an estate devolved upon him by the will of his wife. That would be a very barren contention on their part, because, if well founded, the Crown alone would be the beneficiary.

What the plaintiffs seek is the application of a principle of public policy, which they say exists and which forbids a homicide to acquire property under the will of the person whom he has slain. That principle has been, if I may say so, righteously applied in a case where the homicide amounted to murder, and the devisee was convicted of that crime; a murder which he had, moreover, committed for the very purpose of preventing the testator from altering his will: *Riggs v. Palmer*, 115 N. Y. 506. The judgments in that case, which is nearly contemporaneous with the *Maybrick* case—*Cleaver v. Mutual Reserve*

Judgment.

OSLER,
J.A.

Fund Life Association, [1892] 1 Q. B. 147, contain an interesting discussion of the question, and while they impress one strongly with the justice of the conclusion there arrived at, they lead one to doubt whether the principle can justly or safely be invoked where the devisee has been convicted of manslaughter only, or at least where the evidence in the civil suit shews only a conviction for that offence without any surrounding circumstances which might give it an aggravated character. The murder of a testator for the purpose of preventing an alteration of his will might well be held to exclude the murderer from the operation of the general laws of the land relating to the devolution of property. These laws were not made to enable one to acquire property by the commission of a crime. Within this limit, we might with universal approval apply the rule of the civil law *nemo ex suo delicto meliorem suam conditionem facere potest*. The offence of manslaughter, however, may be in its circumstances of the most venial description and *ex vi termini* cannot have been committed with any regard to the operation of the will or for the purpose of acquiring property. The succession to property is as it were merely indirectly connected with the offence, and I think we cannot venture to adopt as a principle of public policy ruling a novel case of this kind, that one who has committed the offence of manslaughter merely shall not take as devisee or heir of the person he has killed. The rules of the civil law went very far in this respect, preventing one who had merely attempted the life of the testator from taking under his will, and were we at liberty to adopt them as a guide to declaring the public policy of our law, even in such a case as the one before us, the plaintiffs' contention might prevail. This, in my opinion, we cannot do, and therefore with all respect for my learned brother Ferguson, with whose opinion upon the other part of the case I fully concur, I am obliged to say that the appeal should be allowed.

I refer to *New York Mutual Life Insurance Co. v.*

Armstrong, 117 U. S. 591; *Hatch v. Mutual Life Insurance Co.*, 120 Mass. 550; *Owens v. Owens*, 100 N. Car. 240; *Clark v. Hagar*, 22 S. C. R. 510; 24 American Law Review, p. 141; 29 Central Law Journal, pp. 461, 462.

Judgment.

OSLER,
J A

MACLENNAN, J. A. :—

The death occurred on the 22nd April, 1892, after the passing of the Devolution of Estates Act, R. S. O. ch. 108; and the Act amending it, 54 Vic. ch. 18 (O.), which was passed on the 4th May, 1891. This action was commenced on the 26th April, 1893, a little more than a year after the death, and there is no mention in the pleadings or evidence of the registration of any caution by the plaintiffs, in pursuance of section 1 of the amending Act. No reference was made to the Act in the argument before us, or apparently before the trial Judge, and the only mention of it by any one or anywhere appears to be in the judgment, in which it is supposed that the lands devolved upon the plaintiff McKinnon as administrator of the estate of the testatrix.

I think we must assume that no caution was registered, and if not the result would be that when the defendant got his deed from James Lundy the latter had no title, the deed having been made within twelve months of the death, and at a time when the title was still in the plaintiff. But in the absence of a caution, the effect would seem to be that at the expiration of the twelve months, the land became vested in the defendant as the assignee of his brother James, without the necessity of a conveyance. Such, at all events, would be the effect on the supposition that the devise was in other respects good; for I think the words of the Act, "or their assigns as the case may be," must apply to a case like this where the devisee has conveyed to another person before the expiration of twelve months from the death, and were intended to vest the title in the assignee.

We must take it, therefore, that the title is in the de-

Judgment. fendant, unless one or other of the objections to the devise
MACLENNAN, to James Lundy is good.
J.A.

I agree entirely in the conclusion of the judgment on the first question, namely, that the condition of payment of the mortgage is a condition subsequent, which became impossible of performance in the lifetime of the testatrix, and therefore did not affect the gift.

The other question is one of more difficulty. It is whether this case is governed by the principle applied in *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147. In that case it was held that by reason of the crime of the wife a trust in her favour of insurance money on her husband's life could not be enforced at the instance of her assignee or administrator. The principle applied was one of public policy; that she could not invoke the aid of the Court to obtain a benefit from her own crime.

Lord Esher said that by her crime she had rendered the trust in her favour incapable of performance, that any one claiming through her is shut out by the rule of public policy, that any assignee from her or other person claiming through her cannot recover the money; and Fry, L. J., says (p. 156): "No system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour."

Now the principle applied there appears to me to be inapplicable in the present case. In that case the plaintiff was seeking the aid of the Court to enforce a trust as assignee of Mrs. Maybrick, who had committed the crime. He had nothing, and could get nothing, without the aid of the Court, and on the ground of public policy the Court refused its aid. The present case is quite different. The defendant Lundy is not seeking the aid of the Court. He does not require it, the validity of the will is not disputed. It is admitted to be a good will; and administration with

the will annexed has been granted by a Court of competent jurisdiction to the plaintiff McKinnon. The will gives the land to James Lundy, and I am unable to see any ground or principle upon which it can be held that the legal title, at all events, did not pass to him. The testatrix being dead, her estate has thereby devolved upon some person. She did not die intestate, but actually disposed of the estate by her will, which it is admitted was duly executed according to law, and was a valid will; and, therefore, I think the conclusion is inevitable that the legal title passed under it according to its purport. Therefore, in order to succeed, the plaintiffs must shew that on grounds of public policy, or on some other ground, the Court has power to take the land away from the devisee and give it to the plaintiffs, the infant heirs-at-law of the testator. The Devolution Act has not put land in all respects in the same position as personal estate, and I apprehend that the title of land devised, after the lapse of twelve months without caution, vests in the devisee, and does not require the assent of the executor like a legacy. Without assent a legacy could not be recovered at law, and the Maybrick case could be applied to the fullest extent in answer to an action for a legacy where there had been no assent.

Judgment.

 MACLENNAN,
J.A.

One can easily understand that in the case of a murder committed with the very object of getting property of the deceased by will or intestacy, the Court could defeat that object, even by taking away from the criminal a legal title acquired by such means; and it may be that the Court would go further and take the legal title away even though the crime were committed without that object: See *Lutterel v. Lord Waltham*, cited by Lord Eldon in *Huguenin v. Baseley*, 14 Ves. 273, 290, and 2 W. & T. L. C., 6th ed., 611; *Mestaer v. Gillespie*, 11 Ves. 639; Story's Equity Jurisprudence, secs. 256, 440.

It is not, however, necessary to decide how that would be, for this is not a case of murder, and there is no suggestion that the crime was committed with any reference to property at all. There is, therefore, no ground on which,

Judgment. in my judgment, the title to this land could be taken from
MACLENNAN, James Lundy, and given to the infant plaintiffs; or on
J.A. which he could be held to be a trustee for them. On this
point I agree with what has been said by the other mem-
bers of the Court. If that is so then the conveyance to
the defendant Joseph Lundy is good against the plaintiffs,
and the appeal should be allowed and the action dismissed

Appeal allowed with costs.

SCOTTEN V. BARTHEL.

Deed—Description—Evidence—Falsa Demonstratio.

The deed to the plaintiff in an ejectment action purported to convey "part of lot forty-three," described as "commencing in the southerly limit of said lot forty-three, at a distance of 20 feet from the water's edge of the Detroit river, thence northerly parallel to the water's edge 208 feet, thence westerly parallel to the said southerly limit 600 feet more or less to the channel bank of the Detroit river, thence southerly following the channel bank 208 feet, thence easterly 600 feet more or less, to the place of beginning, together with the fishery privileges appurtenant to the premises hereby conveyed":—

Held, that the patent of lot forty-three might be looked at to ascertain the point of commencement; that as that lot was described as running to the water's edge of a navigable river, the point of commencement must be taken to be 20 feet landwards, and that the plaintiff was entitled to claim the strip of 20 feet along the water's edge.

Judgment of the Queen's Bench Division reversed.

THIS was an appeal by the plaintiff from the judgment of the Queen's Bench Division. Statement.

The action was brought to recover possession of a strip of land, twenty feet in width, on the left bank of the Detroit river, near Sandwich. The plaintiff claimed title under a deed of the 13th of January, 1883, registered on the 22nd of January, 1883, from Laurent Bondy to C. W. Gauthier, the description in that deed being as follows:

"All and singular that certain parcel or tract of land and premises situate, lying and being in the township of Sandwich West in the county of Essex, in the Province of Ontario, being composed of a part of lot (43) forty-three in the first concession of the said township of Sandwich West, described as follows: Commencing in the southerly limit of said lot 43 at a distance of twenty feet from the water's edge of the Detroit river, thence northerly parallel to the water's edge 208 feet, thence westerly parallel to the said southerly limit 600 feet more or less to the channel bank of the Detroit river, thence southerly following the channel bank 208 feet, thence easterly 600 feet, more or less, to the place of beginning, together with the fishing privileges appurtenant to the premises hereby conveyed."

Statement.

For about 600 feet from the left bank the Detroit river is shallow, and the "channel bank" is the name locally given to the point where deep water begins.

The defendant claimed under a later deed of the 3rd of January, 1893, from Laurent Bondy to him, of the land in question and other land.

The action was tried at Sandwich on the 18th of September, 1893, before FALCONBRIDGE, J., who held that the point of commencement of the description of the plaintiff's land was doubtful, and dismissed the action, and his judgment was affirmed by the Queen's Bench Division.

The plaintiff contended that the patent of lot 43 might be looked at to ascertain the boundaries of that lot, and the point of commencement of the description. The description in the patent of lot 43 was as follows:

"A certain parcel or tract of land situate in the township of Sandwich, containing by admeasurement two hundred and thirty-eight acres, be the same more or less, being composed of lot No. 43, Petite Cote, and 38 in the second concession, which said 238 acres of land are butted and bounded, or may be otherwise known as follows, that is to say: Beginning at a post in the limit between the first concession (or Petite Cote, being an old French settlement) and the second concession marked 37-38, then north 9 chains, 48 links, then east 127 chains, then south 9 chains, 48 links, then west 127 chains to the place of beginning, being lot No. 38, containing 120 acres. The side lines of lot No. 43 running back from Detroit river on a course south seventy-three degrees east nearly, containing 118 acres."

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 25th of September, 1894.

McCarthy, Q. C., *W. Nesbitt*, and *O. E. Fleming*, for the appellant, contended that the patent of lot 43 might be looked at; that the land granted by that patent extended

only to the water's edge of the Detroit river, that being a navigable river; that the point of commencement must, therefore, be landwards; and that the plaintiff was entitled to recover as much of lot 43 as the description, taking that point of commencement, would include. Argument.

E. D. Armour, Q. C., for the respondent, contended that the description was fatally indefinite and could not be cured by reference to the patent of lot 43; that the plaintiff could not limit and destroy the effect of the deed under which he claimed; and that the surrounding circumstances and the language of the deed itself shewed that the plaintiff had intended to buy a water lot and not this strip of land.

November 13th, 1894. HAGARTY, C. J. O.:—

The case for the plaintiff failed in the Courts below, because (as I understand it) his conveyances did not clearly shew the point of commencement in the description so as to include the piece of land on the river bank, for the recovery of which he brought this action.

We must decide the case on the paper title shewn; it cannot be affected by a large mass of parol evidence as to what certain parties may have understood, or thought they understood, as to the property intended to be conveyed.

It was admitted that the title was rightfully in Laurent Bondy, who, in 1883, conveyed to Gauthier, and through him it was conveyed to the plaintiff.

The only prior deed put in evidence was the patent from the Crown, 24th October, 1798, to Joseph Puget.

As this patent reads, it does not indicate that any land was granted beyond the edge or bank of the river. The next deed is that from Bondy. No intermediate conveyance or grant is in evidence in the eighty-five years between his deed and the patent.

I, therefore, see no title shewn in him of any water lots or title beyond the edge of the river.

Judgment.

HAGARTY,
C.J.O.

By Bondy's deed to Gauthier, he assumes to convey a large tract westerly outside the water's edge of the river, out to what is called the channel bank. This is a tract of rather shallow water out to where the deep water channel of the river commences.

It appears to me to be reasonably clear that the patent for lot 43 did not extend that lot beyond the water's edge.

It says: "the side lines of lot 43 running back from Detroit river in a course south 73 degrees east nearly."

Then Bondy, in 1883, conveys a part of lot 43, and says: "Commencing in the southerly limit of said lot 43 at a distance of twenty feet from the water's edge."

With much respect, I fail to see how it is possible to "commence in the southerly limit of lot 43," at a point, as the defendant contends, out in the water beyond where we have any right to consider that such a line can extend. The line of lot 43 is the line of a lot inside, not outside the water's edge.

It is quite true that he professes to convey land covered with water some 600 feet out in the navigable stream, treating that as a part of lot 43.

I am unable to accept the argument that by taking or claiming under Bondy's conveyance, the plaintiff is, as it were, estopped from denying that lot 43 did so extend.

He may seek to recover a piece of land which he insists is covered by his conveyance, without being bound to acknowledge that the rest of the property in his deed passed to him thereby or was correctly described.

It was, of course, arguable as to what the parties to that deed understood was owned by or grantable by Bondy, but not to the extent that the legal effect of the words "in the southerly limit of lot 43," must be held to be a projection of that line, or rather a legal creation of that line, out into the navigable waters.

The only legal lines could be those according to the grant from the Crown, and such grant stated that the lines ran from the water's edge easterly.

We are not dealing with a question as to the reformation of any deed, but solely with the existence or non-existence of a paper title in the plaintiff.

Judgment
HAGARTY,
C.J.O.

He contends that, notwithstanding any water lots or rights professed to be conveyed by his original grantor, Bondy, the piece of land he claims lies on lot 43 east of the Detroit river. The surveyor called by the defendant, says, "the westerly boundary of lot 43, would simply be the river;" therefore, if it be established that the point of commencement is in the southerly limit of lot 43, at a distance of twenty feet from the water's edge, the plaintiff has made out a *prima facie* case.

BURTON, J. A. :—

I am not pressed with the difficulty suggested as to the point of commencement in the description in the plaintiff's deed.

The moment it is established that lot 43 did not extend beyond the water's edge, and we find that the point is not only twenty feet from the water but also in the southern limit of 43, all uncertainty ceases. It does not in my opinion affect the question that the grantee was taking under a conveyance which treated the land conveyed, which was covered with water, apparently as part of 43.

If the land had been described not as part of 43, but as a piece or parcel of land which may be thus described, adding the rest of the description contained in this deed, there could have been no difficulty whatever. Applying the maxim "*Utile per inutile non vitiatur*," we may reject that portion which describes the land conveyed as part of 43, or we might treat the present description as part of 43 as applicable to a portion of the land conveyed, leaving the residue without other description than that by metes and bounds.

I think the appeal should be allowed.

Judgment. OSLER, J. A. :—

OSLER,
J.A.

I am of opinion that this appeal must be allowed. If we can discover no certain standpoint in the description, either in its language alone or from any extrinsic circumstances we are entitled to call in aid to explain its meaning, the plaintiff must fail, and it is said that the point of commencement is uncertain because we cannot tell whether it is twenty feet easterly or westerly from the water's edge of the river, that is to say, on the land or in the water.

"No parol evidence can be used to add to or detract from the description in the deed, or to alter it in any respect, but such evidence is always admissible to shew the condition of every part of the property, and all other circumstances necessary to place the Court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument": *Baird v. Fortune*, 4 Macq., at p. 149; *Shore v. Wilson*, 9 Cl. & F. at p. 565.

It is perfectly admissible then to ascertain where the southerly limit of lot 43 is situate, and also the extreme east and west points of that limit, that is to say, the length of the lot and its east and west boundaries.

From the patent from the Crown, it appears the lot extends to or from the water's edge of the Detroit river. The river is its westerly boundary, for as shewn by the judgment in the Court below, the river being a navigable river and an international boundary, the patent grants only the land to the water's edge and not to the middle thread of the river. Then, if the southerly boundary of the lot does not and cannot extend beyond the water's edge and the deed purports to convey a part of the lot it follows that a point in the southerly limit of the lot at a distance of twenty feet from the water's edge of the Detroit river is certain and definite and cannot by possibility mean anything but a point easterly from the water's edge, that is to say, on the land, and not a point westerly from it in the water, which could not be in the southerly limit

at all. The several other courses in the description enclose a diagram of which, no doubt, the vendor owned nothing but the easterly twenty feet by 208, but that cannot affect the sufficiency of the description to pass what really belonged to him. Everything else is but *falsa demonstratio*.

Judgment.

OSLER,
J.A.

I think the point of commencement controls the whole description, and that as soon as it appears that, being in the southerly limit of lot 43, it cannot be in the water but must be on the land, the reference to the whole parcel conveyed as being part of lot 43 cannot affect the certainty of the description as a whole, though it may appear that the plaintiff can get no title to the greater part of what it calls for.

MACLENNAN, J. A. :—

The sole question in this appeal is the proper construction of the conveyance, dated the 13th day of January, 1883, between Laurent Bondy and Charles W. Gauthier.

If the point of commencement is sought landwards, the parcel described includes a parcel of dry land, and also a parcel of land covered by the water of the river; whereas, if it is sought outwards into the river, it includes nothing but land covered with water.

It seems to me the whole question turns upon what is, for the purpose of the description, to be regarded as lot 43 in the first concession of Sandwich West. That is *prima facie* to be settled by the original grant from the Crown. When it is referred to, and it was put in evidence, we find that lot 43 does not extend into the river at all, and that its southerly limit lies wholly upon the dry land.

It is said, however, that the description shews that the parties to the deed thought that lot 43 extended into the water, for they say, "that part of lot 43 described as follows," indicating that the whole parcel intended to be conveyed is part of lot 43; that, however, is merely a common case of *falsa demonstratio*; for when the description by metes and bounds is attended to, it is found that it is not all

Judgment. parcel of lot 43. That is so whatever point of commence-
MACLENNAN, ment be taken, whether it be taken according to the con-
J.A. tention of the appellant or of that of the respondent. In the one case it would be partly within and partly without lot 43; and in the other wholly without it.

The learned trial Judge and the Divisional Court have held, as I understand it, that the deed is void for uncertainty as to the point of commencement in the description of the parcel.

With great respect, I am of opinion that there is no such uncertainty. I think it clear that the point of commencement is to be measured easterly, that is, landwards from the water's edge, and not out into the water.

When we take up the deed and desire to find the land which it purports to convey, we cannot take the very first step until we find out lot 43 in the first concession of Sandwich West. That is the first thing we must do. How and where are we to find it? We cannot find it in the deed. The deed says, "commencing twenty feet from the Detroit river." But the Detroit river is many miles in extent. It is a common boundary to many lots of land, and by itself it does not give us what we want. The deed does not refer to any other natural landmarks, or any artificial monuments for our guidance. Therefore, we must go outside of the deed to find lot 43; and the only place to which we can go is the Crown patent. When we look at that, we see at once where lot 43 is, and what its boundaries are; and it declares that the side lines run back from the Detroit river on a course south seventy-three degrees east nearly. Having now found lot 43 and its southerly boundary, we look again at the deed, and we begin at a point in that southerly boundary, twenty feet from the water's edge. There is only one such point, for the patent says the side lines of lot 43 run back from the Detroit river on a course south seventy-three degrees east nearly.

Up to this point there is no doubt, no ambiguity, no uncertainty; all is as clear and certain as anything can

be. But we proceed with the metes and bounds, and at a certain point, contrary to expectation, they lead us outside of lot 43. What is the effect of that? Is it to say that lot 43 is not lot 43, but lot 43 plus something else, with the result of making the whole deed nugatory and inoperative? No, it is merely to shew that the words "part of lot 43" are *falsa demonstratio*, a mere error, corrected by the subsequent particular description, and to be read as "that part of lot 43 and other land," in order that "*res magis valeat quam pereat*."

Judgment.

MACLENNAN,
J.A.

The same result may be reached by another argument. The parties clearly meant to deal with some part of lot 43. By taking the one point of commencement that object is effected, whereas, by taking the other point, no part whatever of lot 43 is included in the description. That enables us to see that the first point of commencement must be what the parties intended.

I therefore think that the appeal should be allowed, and that there should be judgment for the plaintiff with costs.

Appeal allowed with costs.

GRINSTED V. THE TORONTO RAILWAY COMPANY.

Damages—Remoteness—Expulsion from Street Car—Taking Cold.

Where there was some evidence that serious illness from which the plaintiff had suffered had resulted from exposure to cold upon illegal expulsion from a street car an award of damages in respect of that illness was upheld.

Judgment of the Common Pleas Division, 24 O. R. 683, affirmed, HAGARTY, C. J. O., dissenting.

Statement.

THIS was an appeal by the defendants from the judgment of the Common Pleas Division, reported 24 O. R. 683.

The plaintiff brought the action to recover damages because he had been put off a car of the defendants. His contention was that a serious illness from which he suffered had resulted from exposure to cold at the time he was thus put off; and at the trial \$300 damages were allowed to him by the jury in respect of this illness.

This allowance was upheld by the Common Pleas Division, and the defendants appealed on this point, the appeal being argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 18th of September, 1894.

Laidlaw, Q. C., and J. Bicknell, for the appellants.

W. J. McWhinney, for the respondent.

The line of argument was the same as that stated in the report below, and in addition to the cases there mentioned, the following authorities were referred to: *Pullman Palace Car Co. v. Barker*, 4 Col. 344; *Murdock v. Boston and Albany R. W. Co.*, 133 Mass. 15; *Houston v. Traphagen*, 47 N. J. L. 23; *Williamson v. Grand Trunk R. W. Co.*, 17 C. P. 615; *Bell v. Great Northern R. W. Co.*, [1890] 26 L. R. Ir. 428; *Isitt v. Railway Passengers Assurance Co.*, 22 Q. B. D. 504.

November 13th, 1894. BURTON, J. A. :—

Judgment.

BURTON,
J.A.

The jury have found that the plaintiff's illness was the natural result, the natural or probable result, of his having been turned out of the car ; that being so, I do not see why, to use the language of Lord Bramwell, a passenger who by default of the railway company was obliged (there to walk home of a dark night) here to wait in the cold for another car might not recover in respect of such illness.

I think it was proper to leave it to the jury to say whether the cold which the plaintiff caught was the natural or probable result of the defendants' conduct, and I cannot say that their finding in that respect was unreasonable.

I am of opinion, therefore, that we ought not to interfere with the judgment of the Court below.

MACLENNAN, J. A. :—

I am of opinion that we must affirm the judgment.

It was fairly left to the jury to say whether the plaintiff's illness was occasioned by his expulsion from the car and the circumstances attending it, and they found that it was. I think there was evidence to support their finding, and that there is no ground on which we could set it aside.

The only other question which could be raised is whether the sickness was so remotely connected with the wrongful act that in point of law it was not recoverable, and I think that question must also be decided in favour of the plaintiff. I think we cannot say it was a remote and uncertain accidental result and not the direct and immediate consequence of the wrongful act, and it is therefore one for which a recovery is allowed by law.

OSLER, J. A. :—

I am of the same opinion.

Judgment. HAGARTY, C. J. O. :—

HAGARTY,
C.J.O.,

I only propose to discuss two cases, as it seems to me that between them they contain most, if not all, of the present law of the English Courts.

Hobbs v. London and South-Western R. W. Co., L. R. 10 Q. B. 111, as I understand it, is apparently fatal to the plaintiff's right to recover on his second head of damages.

It is said to be in effect overruled by *McMahon v. Field*, 7 Q. B. D. 591.

There is a good deal said in the latter case disparagingly of the former.

But the facts appear to me essentially different.

The plaintiff had contracted with the defendant for stabling for his horses during the Rugby fair. When they arrived at night and were put into their stable, they were wrongfully turned out without their clothing by a third person who had also bargained for stabling for his horses, and such turning out was apparently with the sanction and assistance of the defendants. Before fresh stabling could be procured, the horses had to stand there being exposed in the night air, and some of them caught cold and depreciated in value.

It was held that the plaintiff could recover for the injury to his property, besides the general damage for the breach of contract.

I cannot see the difference between this recovery and a recovery for injuries to bales of goods from exposure to rain by being wetted and seriously injured thereby, their value (according to their quality) being materially lessened by the wet.

This was an injury to chattels, and I must say, with much respect, that I cannot see the similarity in the cases, or how the later decision affects the important principle that governed the earlier case.

The injury to chattels by exposure to wet, storm, or frost, arising from a breach of contract, providing for their due protection therefrom, seems to me a very clear cause

of action, involving no such considerations as weighed Judgment.
with the Court of Queen's Bench in *Hobbs's* case.

HAGARTY,
C.J.O.

The latter Court, a very strong one, consisting of Cockburn, C. J., Blackburn, Mellor, and Archibald, JJ., very fully discussed the main question, and unanimously held that where a plaintiff, on a railroad contract to be carried to Hampton Court station, was carried only as far as Esher station, and the train not going farther, was compelled, with his wife and young children, to walk four or five miles to reach his home in a drizzling rain, he was entitled to damages for all his inconvenience and personal trouble, not being able to procure a conveyance, etc., but not, in addition to the £8 awarded for this, to a further sum of £20 awarded by the jury as damages, his wife having caught cold in the walk through the rain, and having been disabled for a while from working, and medical expenses having been incurred.

All the four judgments delivered are most instructive.

One of the learned Judges (p. 125) says: "With regard to what might be the result of the walk home, the wet night, the condition of health, the state of the plaintiff herself, all these things could not have been in the contemplation of the parties when they made the contract. I think, therefore, that this does fall beyond the line. I think it is too remote."

Blackburn, J., says that such damages were too remote; that it is clear enough that a person is to recover in the case of breach of contract, the damages directly proceeding from that breach of contract and not too remotely.

As to remoteness, he says the rule is very vague, and he quotes Bramwell, B., that it is something like having to draw a line between night and day when twilight intervenes. He says you may make it a little more definite by saying that such damages are recoverable as a man when making the contract would contemplate to flow from a breach of it.

He held that these damages were on the remote side of the line, and that the Court must say whether it is on one

Judgment. side or the other: "I do not think the question of remoteness ought ever to be left to a jury; that would be in effect to say that there shall be no such rule as to damages being too remote; and it would be highly dangerous if it was to be left generally to the jury to say whether the damage was too remote or not."

HAGARTY,
C.J.O.

Then comes *McMahon v. Field*, 7 Q. B. D. 591, decided in 1881, by Bramwell, Brett, and Cotton, L. JJ.

Bramwell, L. J., said he did not think that *Hobbs's case* governed, adding (p. 594): "Here the damage would not have happened if there had not been a breach of contract, and although that breach may not directly have caused the damage, yet it was the only event without which the damage could not have happened. I do not, therefore, dissent but agree that this appeal should be allowed."

He also said that had he been left alone to consider the case he should not have been prepared to hold that the plaintiff was entitled to receive the £50 given for the injury to the horses.

Brett, L. J., says: "There is a difference, though I own I do not see much, between this case and that of *Hobbs v. London and South-Western R. W. Co.*, L. R. 10 Q. B. 111.

He puts a case of a man letting lodgings to a woman and then turning her out in the middle of the night with only her night clothes on, and asks "Would it not be a natural consequence that she should take a cold?"

I have already pointed out my view as to the patent difference between injury to inanimate goods by breach of contract exposed to injury from cold or wet. Horses, or other animals, incapable of action by volition, seem to me in precisely the same position. When we deal with a man capable of governing his own actions the case seems widely different.

The present plaintiff, on an unusually cold winter night, clad in seasonable garments as we may assume, walks some distance, waits ten minutes at the point, when he gets into the second car. He then, after proceeding some distance, has the altercation with the conductor which became hot;

very strong language is admitted to have been used by the plaintiff, provoked, as he says, by the conductor's language imputing an attempt by him to evade payment. He had car tickets with him, but would not give one (value four cents) but stood upon his rights. He had to leave by compulsion, but no personal violence was used.

Judgment.
HAGARTY,
C.J.O.

He was entitled to damages for all this, and he has been awarded \$200, a very liberal compensation.

But he says this altercation put him into a perspiration. He stepped out, and, as he says, "got cold then." He then went back to find the transfer agent at the point where he had got in—talked with him, and then stood twenty minutes on the street waiting for another car to come on, into which he got—came out again—went to some hotel to look for letters, and then went home to Toronto street, when he got there felt "very cold—chilled to the bone." He says he caught a severe cold and was feverish next day—went out to see his employers, came home, and was laid up for three weeks or so.

The jury were told "if the illness was the natural result—the natural and probable result—from his having been turned out of the car on that night, then find damages on that ground as well."

The jury gave \$300 damages on that head, in a general verdict.

No other direction or explanation of the law was given to the jury.

As one of the learned Judges in the Court below said: "As to the particular occasion on which he took the cold conducing to his illness, one would say it must be somewhat a matter of conjecture."

I may say it is so much a matter of conjecture that I can hardly understand a jury venturing to give these damages after awarding very substantial damages for the actual wrongful expulsion.

As was pointed out in *Hobbs's* case all this alleged injury arises from causes impossible to have been contemplated or foreseen. All this occurred in the public streets of the city.

Judgment.
HAGARTY,
C.J.O.

Whether the night should happen to be warm or cold; whether the plaintiff was more likely to be susceptible of cold; whether his temperament was excitable or phlegmatic; whether he would by strong language or passion work himself into a perspiration, and thereby become liable to take a chill; whether such chill arose or had its origin in his first ten minutes' wait for the car or his subsequent twenty minutes' wait for the other car, all such conjectures leave us in perplexity.

I cannot see how I am not bound to follow my strong opinion that the doctrine so well expressed in *Hobbs's* case ought to govern and does govern claims like the present.

The case is not, as I understand it, overruled, because it is spoken of disparagingly. All the disparaging remarks on *Hobbs's* case emanate from Brett, L.J. The third Judge, Cotton, L. J., does not refer to it.

On the whole I do not think a case was made out on this head of damages, which should have been left, as it was, to the jury.

Appeal dismissed with costs,
HAGARTY, C. J. O., *dissenting.*

IN RE WILSON AND THE COUNTY OF ELGIN.

High Schools—Alteration of Districts—54 Vic. ch. 57, sec. 6 (O.)—57 Vic. ch. 58, sec. 1 (O.)

Under section 6 of the High Schools Act, 54 Vic. ch. 57 (O.), as amended by 57 Vic. ch. 58, sec. 1 (O.), a county council has power to detach a township from a high school district without the consent of that township or of the other townships included in the high school district in question.

Judgment of ROBERTSON, J., affirmed, OSLER, J. A., dissenting.

THIS was an appeal from the judgment of ROBERTSON, Statement.
J., dismissing an application to quash a by-law.

The by-law was passed by the council of the county of Elgin, on the 26th of January, 1894, "under the authority of the High Schools Act," and detached the township of Aldborough from the Dutton high school district, and the townships of South Dorchester and Malahide and the village of Springfield from the Aylmer high school district.

The applicant contended that the county council had no jurisdiction.

The appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 28th of September, 1894.

N. McDonald, and *W. J. Tremear*, for the appellant. The power to pass the by-law in question is conferred by section 6 of 54 Vic. ch. 57 (O.), if at all, but it is submitted that the power is not thereby conferred. The Legislature had followed a steady policy of depriving county councils of any control over high school districts, and it is not to be presumed that such policy was abandoned and the power conferred by the equivocal language of this section: See 37 Vic. ch. 27, secs. 38 and 39 (O.); 40 Vic. ch. 16, sec. 18; *Re Board of Education of Morrisburg*, 8 A. R. 169. The power to determine the limits of high school districts is by the same Act, 54 Vic. ch. 57 (O.), conferred on the minor muni-

Argument. cipalities, and it is not to be presumed that the power, which might be exercised in conflicting and inconsistent ways, was to be co-existent in the county and minor municipalities. The by-law imposes a burden on those municipalities still within the high school district by releasing the detached portions from obligations undertaken by the district. The Act 57 Vic. ch. 58 (O.), does not affect the case. It was not passed until after this motion was launched; and it is not properly a declaratory Act.

J. M. Glenn, for the respondents. All the high school districts in the county of Elgin were established from time to time by the county council of the county of Elgin, and not by agreement between the various municipalities and the municipal council of the county had the right to pass the by-law. If any doubt existed as to the true meaning of section 6 of 54 Vic. ch. 57 (O.), such doubt has been removed. The Legislature has placed an interpretation upon the section, and has declared that it intended to confer upon the municipal councils of counties the power to change existing high school districts: 57 Vic. ch. 58, secs. 1 and 3. Sub-section 2 of section 7 of 54 Vic. ch. 57 (O.), was intended to give the ratepayers of any municipality the right to withdraw from a high school district in case the council of the county refused to pass the necessary by-law for that purpose, but it must be assumed in this case, because the contrary has not been shewn, that the county council in passing the by-law in question was simply carrying out the wishes of the ratepayers of the different municipalities which have been detached, and therefore a liberal and not a strict construction ought to be given to section 6 of the Act. The amendment made by 57 Vic. ch. 58 (O.), shews clearly that according to the true meaning of section 6, the municipalities detached are not relieved from obligations incurred prior to the passing of the by-law in question, but even if that were not so effect must be given to the clear language of section 6 regardless of consequences.

N. McDonald, in reply.

November 13th, 1894. HAGARTY, C. J. O. :—

Judgment.

HAGARTY,
C.J.O.

It was conceded in argument that the case turns upon the effect of The High Schools Act, 1891, 54 Vic. ch. 57 (O.).

Section 6, sub-sec. 1, declares that all high school districts in existence on the passing of the Act, shall remain as then constituted until changed by the municipal council of the county by which they were established, or until altered as is hereinafter provided, saving all pending proceedings in which the validity of any district may be in question.

By sub-section 2, it is provided that where prior to the 1st of January, 1878, the county council had by by-law set apart and constituted any portion of the county as a separate district for high school purposes, the by-law if not quashed, repealed, etc., should, to all intents and purposes, be valid and binding, and the high school districts thereby constituted, should be deemed to be validly constituted.

An Act of last session [57 Vic. ch. 58 (O.)] adds these words to sub-section 1 of section 6 of this Act: "Any change made as aforesaid shall not relieve the lands in a high school district or any portion thereof from any rates legally imposed for the issue of debentures or from any other debts legally incurred prior to such change," and after making another addition, section 3 of the Act says: "The amendments to the said Act herein contained, shall be deemed to be declaratory of the meaning and intention of the High Schools Act, 1891."

We must, therefore, read the Act of 1891, governing this case, as declared to mean what is added by the Act of 1894, although passed after this contention arose.

Section 7 allows a township municipality, on a petition of two-thirds of the ratepayers in a township or in any portion thereof, contiguous to a high school district, by by-law to unite the whole or a portion to any high school district.

Sub-section 2 provides that on like petition they may withdraw from such high school district without the con-

Judgment.

HAGARTY,
C.J.O.

currence of any other municipality composing the high school district, such withdrawal not to release the part withdrawn from legal rates, etc.

Then, under the heading of "New High Schools," section 8 allows the county council, subject to the approval of the Lieutenant-Governor in Council, to pass a by-law for the establishment of a new high school in any municipality containing not fewer than 1,000 inhabitants, and in like manner to discontinue, at the end of the current year, any high school already established.

Sub-section 2 provides that the council may, in like manner, form a high school district composed of more municipalities than one, and establish a high school in any incorporated village though containing less than 1,000 inhabitants, under certain conditions as to the consent of the Lieutenant-Governor in Council; and by sub-section 3, with such approval, the council of a city may establish as many high schools as may be deemed expedient.

It is to be observed that these sections, where the assent of the Lieutenant-Governor in Council is required, refer to the establishment of new high schools.

Section 7 empowers municipalities (not of counties) on certain petitions, to unite with or to withdraw from any contiguous high school district.

We have to deal with the case of a county council merely withdrawing one township, Aldborough, from the Dutton high school district, then consisting of that township and the township of Dunwich.

This district had been created in 1875.

The Act of 1891 declares such creation of districts valid, and so to continue until changed by the county council, or, in the alternative, till altered under the subsequent provisions of the Act.

Then to this clause, the declaratory Act declares that "any change made as aforesaid"—that is by the county council—"shall not relieve the lands," etc.

I am unable to read this statute otherwise than as enabling the county council to make this alteration. The

giving of power to the minor municipalities in a certain manner to add or detach portions to or from a high school district cannot, I think, defeat the operation of section 6. Nor can section 8, as to consent of the Lieutenant-Governor in Council where new high schools are sought to be established, have the effect contended for by the appellant.

I think that we must dismiss the appeal.

Judgment.
HAGARTY,
C.J.O.

BURTON, J.A. :—

The appellants contend that inasmuch as the Act of 1877, 40 Vic. ch. 16 (O.), deprived the county council of the further power to construct high school districts, the Legislature could not have intended, by a side wind, to renew that power under section 6 of the Act of 1891, 54 Vic. ch. 57 (O.), but that is to overlook what was pointed out in *Re Board of Education of Morrisburg*, 8 A. R. 169, that it left its destructive powers untouched.

The power was transferred from the county council to the minor municipalities; a change of policy which was given further effect to by 41 Vic. ch. 15 (O.).

But whilst the Act of 1877 put an end to the county council's power to construct high schools, it expressly affirmed the power to discontinue them. See sub-section 2 of section 18.

The language of section 6 of the] Act of 1891 differs somewhat from that used in some of the previous Acts, but is not the meaning the same? It recognizes the existence—which it confirms—of all high schools then established, which are to remain as then constituted until changed by the council of the county by which they were established. In the former Acts the language employed was until they thought fit to discontinue the same. I do not know why the change is made, and I thought, at first, that possibly if the council had here attempted to discontinue the high school altogether a question might have been raised, but upon a further perusal of the Act, I find that this is provided for under section 8, sub-section 1.

Judgment.

OSLER,
J.A.

schools, always subject to the consent of the Lieutenant-Governor in council.

This was the legislation carried into the Revised Statutes of 1877, ch. 205, sec. 7.

While the law stood thus, the case of *Re Board of Education of Morrisburg*, 8 A. R. 169 (1883), was decided, in which it was held that, though a county by-law for the reconstruction of high school districts was invalid, a by-law to repeal a former by-law by which a district had been constituted, and thus to discontinue such district, was good.

Then came the High Schools Act of 1885, 48 Vic. ch. 50, sec. 3 (O.), which continued in force all existing high school districts.

Section 4 enacted that there should be a high school or high schools in every county, to be distinguished by the name of the city, town, or village within which the high school was situate, but such school or schools was nevertheless to be deemed one of the high schools of the county and within the jurisdiction of the county council. The implied power to change or abolish any existing high school district, referred to in section 3, is found in section 6, which shews that the only reconstructive power the council held and the only power to constitute a district not coterminous with the county limits, was to constitute an electoral district a separate district for high school purposes in order that it might contribute to the support of one or more high schools therein and in such amount as the council might determine separately from any other electoral district under the jurisdiction of the council.

Section 7 empowers the council to change in the prescribed manner, not the district, but the location of, or to discontinue, any existing high school in any part of the county.

Sections 8 and 9 empower the council, subject to the approval of the Lieutenant-Governor in Council, to establish additional high schools in the county within the prescribed restriction.

This Act, with subsequent amendments, was consolidated in the Revised Statutes of 1887, ch. 226.

Judgment.

OSLER,
J.A.

The policy adopted by the Legislature, first indicated in the revision of 1877, evidently was to encourage the abolition of small or isolated districts, and to establish the necessary number of high schools to be maintained by the county as a whole, or at the least by the electoral district in which they were situate. The Act of 1885 gave no power merely to change the limits of an existing district, or to discontinue one of several districts. All existing districts and divisions were to continue in full force and effect, subject to the provisions of the Act, the effect of which, as I read them, is that all must be abolished if any, and that a high school district must be composed either of the whole county or of one of the electoral divisions thereof.

The Act of 1891, 54 Vic. ch. 57 (O.), reverts to the former policy of smaller high school districts or districts composed of one or more local municipalities, placing the control of their construction with certain restrictions in the hands of the latter.

Section 6, sub-section 1, enacts that all high school districts in existence on the passing of the Act shall remain as then constituted until changed by the council of the county by which they were established, or until altered as is thereafter provided.

In the case at bar the by-law establishing the high school districts in the county which are affected by the by-law now attacked, was passed on the 29th January, 1875, under the Act of 1874, and, amending in that respect a former by-law, No. 240 of the 5th June, 1873, it enacted that the township of Aldborough, in the township of Dunwich, should be erected into a high school district under the name of the Wallacetown high school district. The name of the district was subsequently changed to Dutton high school district, on the 31st January, 1885, and by by-law 522, the subject of the present application, it is enacted that the township of Aldborough be detached therefrom, thus leaving it to be composed of the township of Dunwich

Judgment.

**OSLER,
J.A.**

alone. The question is whether this was within the power of the council.

The district was to remain as constituted at the passing of the Act, until changed by the council of the county by which it was established, or until altered as in the Act thereafter provided. By section 7 we find that on the petition of two-thirds of the ratepayers of any municipality contiguous to a high school district, or on the petition of two-thirds of the ratepayers of a portion of a municipality contiguous to a high school district, the council of such municipality (which does not mean a county municipality: section 2, sub-section 2), shall unite the whole or the portion of such municipality to the high school district.

And by section 7, sub-section 2, a municipality or portion of municipality forming part of a high school district may similarly be by by-law withdrawn from the high school district without the consent of the other municipality or municipalities composing it. By section 8 the county council may at the end of the current year discontinue any high school already established. Section 8, sub-section 2: A county council may pass a by-law for the establishment of a high school in an incorporated village. But the by-law is not to be operative until it is shewn to the Lieutenant-Governor in Council that the adjoining municipalities have passed by-laws for uniting with the village so as to constitute a district containing at least 3,000 inhabitants.

We find here then an overriding and controlling power in the municipalities to unite or withdraw a municipality or portion of a municipality to or from an existing high school district, and the constructive power of the county council is restricted to the case provided for by section 8, sub-section 2, and here, in this respect, the municipality can control the county council. It has not been argued that under the power to change, which it is said is impliedly given by the first part of section 6, the county council has power to change by enlarging or adding to the district, and that would indeed, having regard to the whole of sections 6, 7 and 8, not be an admissible construction. But on

similar grounds, the power to change, by subtracting from the district, is equally inadmissible. It can hardly be supposed that the Legislature meant to confer powers upon the county council which would clash with those conferred upon the municipalities. The words, therefore, "as is hereinafter provided," appear to me to relate both to the change which the county council might make and the alteration which the ratepayers of the municipality may authorize, and so far as regards the council, they point, in my opinion, to proceedings under section 8, under the first sub-section of which the council may discontinue a high school, or, in effect, change an existing one (subject to the control of the minor municipality) by establishing a school in a village to which a contiguous territory has been added, so as to form a district containing not less than 3,000 inhabitants. Unless it be conceded that by the power to change the district is conferred the power to change by adding to as well as detaching from it, which, I think, inadmissible, I think the change which the county council may make is that which would be involved, or caused by proceedings taken under section 8, sub-sections 1 and 2, in effect abolishing the old district, and therefore, that the by-law in question is bad. We have not the advantage of knowing the learned Judge's reasons for his judgment, but it appears to me that he should have quashed the by-law instead of dismissing the application.

Judgment.

OSLER,
J.A.

Appeal dismissed with costs,
OSLER, J.A., *dissenting.*

O'CONNOR V. HAMILTON BRIDGE COMPANY.

Negligence — Dangerous Machinery — Absence of Guard — "Moving Machinery" — "Defect in Machinery" — Factories Act—R. S. O. ch. 208, sec. 15—Workmen's Compensation for Injuries Act—R. S. O. ch. 141—sec. 3—52 Vic. ch. 23, sec. 3 (O.).

The absence of a guard to a projecting screw in a revolving spindle, part of a radial drill, which was used to fasten the drilling tool into the spindle, is a violation of the provisions of the Factories Act, R. S. O. ch. 208, sec. 15, the spindle being a "moving part of the machinery" within the meaning of that Act, and it is also a "defect in the condition of the machinery" within the meaning of the Workmen's Compensation for Injuries Act, R. S. O. ch. 141, sec. 3, as amended by 52 Vic. ch. 23, sec. 3 (O.) and in either view, damages may be recovered for an accident caused by its absence.

Judgment of the Common Pleas Division, 25 O. R. 12, affirmed, Buxton, J.A., dissenting.

Statement.

THIS was an appeal by the defendants from the judgment of the Common Pleas Division, reported 25 O. R. 12

The plaintiff was a workman in the defendants' employ, and brought the action at common law and under the Workman's Compensation for Injuries Act, R. S. O. ch. 141, sec. 3, as amended by 52 Vic. ch. 23, sec. 3 (O.), to recover damages for injuries sustained by him while using a drilling machine under the circumstances set out in the report below.

The action was tried at Hamilton on the 7th of September, 1893, before ARMOUR, C. J., and a jury, when judgment was given in the plaintiff's favour. This judgment was, by a division of opinion, affirmed by the Common Pleas Division.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 18th of September, 1894.

*Bruce, Q. C., and Walker, Q. C., for the appellants.
G. Lynch-Staunton, for the respondent.*

The line of argument was the same as that taken in the Court below, and the cases cited are all mentioned there.

November 13th, 1894. HAGARTY, C. J. O.:—

Judgment.

HAGARTY,
C.J.O.

I have given this case much consideration, and have hesitated for some time as to our disposal of the defendants' appeal.

The case was left by the Chief Justice to the jury in a manner certainly not to be complained of by the defendants.

He asked them if it was the set screw or the drill that got entangled in the plaintiff's clothing. They answered, "the set screw." Then, "Were the defendants guilty of negligence in not having the set screw guarded"? Jury answered: "Yes."

As to contributory negligence, they were asked whether the plaintiff had used proper care in taking hold of the machine as he did, and not seeing that his clothing was clear. They answered: "Yes, according to his own judgment."

The plaintiff says he knew nothing of this set screw, and until he was caught, never apparently saw it, and no one had told him of it.

This appears to have been the first time he had anything to do with this particular machine.

I do not see how we can interfere unless we can hold that there was no case for the jury, and that there was no obligation on the defendants to have this set screw guarded.

There was evidence that in other machines of this character the screw is either sunk below the level and worked by a wrench like a bed key, or is protected by a collar, both in this country and in England. The plaintiff's expert witness said that this course was taken as it was considered "safer against catching a man's clothing or anything of that kind;" and that the machine here in use could be got up cheaper and was easier to get at.

He is then asked: "You don't say it is negligence to build it in this way?" Ans. "Not at all."

Judgment.

HAGARTY,
C.J.O.

I am not now to consider how we should view this case on the merits. We may not view it as the jury have done. But I do not think, if I were trying it, that notwithstanding any opinion I had formed in my own mind, I could properly withdraw it from the jury and hold that there was no case made by the plaintiff; or that as a matter of law the defendants were not legally liable for any damage done by this unguarded screw in rapid motion.

Was its protection a proper precaution to be required on the evidence before the Court?

I think it was proper and necessary to leave the question to the jury.

I do not think that it is a proper view of the law to hold that this set screw was not a "moving part of the machinery," in the words of the Factories Act.

It is true that this Act does not of itself give a right of action like this, but we may refer to its provisions in deciding on a question involving what is or is not negligence.

Under the Workman's Compensation Act, 52 Vic. ch. 23, sec. 3 (O.), the words in the amended section, "any defect in the condition or arrangement of the ways, works, machinery," etc., would seem to cover a case of the non-protection of some part of the machinery which ought to be protected, involving negligence on the part of the employer.

It is not necessary to discuss the distinction drawn by the majority of the Court in the case of *Walsh v. Whiteley*, 21 Q. B. D. 371, relied on by defendants, and as noticed in subsequent cases such as *Morgan v. Hutchings*, 6 Times L. R. 219, and *McCloherly v. Gale Manufacturing Co.*, 19 A. R. 117, in this Court.

On the whole, I have come to the conclusion that we cannot interfere, and that the appeal must be dismissed.

OSLER, and MACLENNAN, J.J. A., concurred.

BURTON, J. A. :—

Judgment.

BURTON,
J.A.

It has been laid down by a very eminent English Judge, that to recover under sub-section 3 of section 3 of the Act in question, five things must be proved.

1st. Injury to the plaintiff.

2nd. Negligence of some person in the service of the defendants.

3rd. That that person was one to whose orders the plaintiff was bound to conform.

4th. That the plaintiff did conform to those orders; and

5th. That the plaintiff's injury resulted from his conforming thereto.

It has to be borne in mind that this is an action for negligence; and the negligence to be established is that of a servant of the defendants giving the orders and the plaintiff conforming to them; the injury must be the result of these two.

There is a conflict of evidence as to the order having been given, but it must now be taken upon the finding of the jury, that an order was given, but only to the extent to which it has been found, which is in fact to the full extent proved by the plaintiff; if he had simply acted upon that order no injury could possibly have happened to him; when he found a difficulty he should either have ceased his efforts or applied for instructions. When he commenced the work, he adopted the proper mode of using the lever, and the injury resulted from his voluntarily adopting another mode not directed.

He has failed, therefore, to make out a case on this branch of the section, and a nonsuit should have been entered unless he is entitled, as Mr. Justice Rose has held, to recover in consequence of the spindle not being guarded.

I do not think that a spindle can be held to fall within the meaning "moving machinery" in the Factories Act; nor do I think that the case of *Morgan v. Hutchings*, 6 Times L. R. 219, lends any support to the view that it is. In

Judgment.

BURTON,
J.A.

that case, the person injured was a boy of thirteen, employed to feed or supply a machine with leather, and unless care was used the fingers were liable to be drawn in the cogs and crushed; these cogs were treated and spoken of as part of the machinery and admitted to be dangerous. But assuming it to be part of the machinery, and that the master owes a duty to the person employed upon the drill, or to a person called to work in close proximity to the drill, he owes no such duty to a workman not so employed, and who chooses voluntarily to assume a position of danger. It was not intended by the Act to make the employers insurers against accident, much less against the carelessness of their servants.

Here, again, negligence has to be established, and granting that even although the machine was new and made by a competent maker, the omission to provide a guard, might, as against a person working the machine, be some evidence of negligence, how is it as regards this plaintiff? For this purpose the plaintiff may be regarded as a stranger. What evidence is there then proper to submit to a jury of negligence of which this plaintiff has a right to complain?

In *Walsh v. Whiteley*, 21 Q. B. D. 371, the majority of the Court refer to an action of this kind in these terms: "The negligence of the employer appears to be a necessary element without which the workman is not entitled to any compensation or remedy. It must be a defect in the condition of the machine, having regard to the use to which it is to be applied" in shewing their view that the person using the machine was the person intended to be protected; and after referring to the wheel, the defect in which was complained of in that case, and saying that a solid wheel would probably have been safer, proceed to say that they were not bound to adopt every fresh improvement. They did not believe such was the intention of the Legislature nor did they think it was intended to relieve workmen from the exercise of that care and caution without which most machinery is dangerous.

I agree with the learned Chief Justice at the trial that

if the not guarding of the screw is the cause of action the Factories Act does not advance the case. The action is as at common law for not using all reasonable precautions for the safety of their servants. The omission to comply with the requirements of that Act for the short time their machinery was in use might be evidence of negligence if some person employed to work upon the drill met with an accident in consequence of such non-compliance; but does the requirement of reasonable precaution extend to making the master liable for negligence to all the workmen engaged in other parts of the building and who have nothing to do with the drill, but who unnecessarily choose to meddle with it. Even if the non-compliance in such case can be termed negligence it is not actionable negligence; the relation of cause and effect in natural and ordinary sequence has to be made out before a liability on the part of the employers can be established.

Judgment.
BURTON,
J.A.

If this action can be maintained the Legislature had better declare once for all that employers are to be insurers not only against accidents but the carelessness of their workmen.

The question here is whether there are any facts in evidence from which negligence bringing about the injury may be inferred. The evidence is very simple: that the plaintiff was directed to move the buggy; that when that direction was given the machinery was not in motion, and even if in motion if done in the ordinary way was attended with no danger. There the evidence tending to connect the defendants with the injury stops. It could never have been in the contemplation of the employers that any workman would place himself in the position of danger that this plaintiff put himself in.

But it is shewn by the plaintiff himself that notwithstanding that the power had been applied he proceeded with the work and undertook voluntarily to move the buggy in a way not authorized. That is undisputed, and being his own voluntary act there could not, as a matter of course, be any negligence imputable to the defendants

Judgment. from that act. He did that of his own motion and at his own risk.
BURTON, J.A.

To this the injury was attributable, and much as I sympathize with the plaintiff, I cannot see how the defendants are responsible. I trust that the defendants will deal generously with him.

Appeal dismissed with costs,
BURTON, J. A., *dissenting.*

BALL V. TENNANT.

Assignments and Preferences—Covenant of Indemnity—R. S. O. ch. 124, sec. 4.

The benefit of a covenant by a third person to indemnify the assignor against a mortgage made by him does not pass to his assignee under an assignment for the general benefit of creditors, at all events not where there has been no breach of the covenant before the making of the assignment.

*Per MAOLENNAN, J.A. :—*Even if the covenant passed, the assignee would hold it as bare trustee for the assignor, or for the mortgagees if subsequently assigned to them by the assignor.

Judgment of the Queen's Bench Division, 25 O. R. 50, reversed.

Statement. THIS was an appeal by the plaintiffs from the judgment of the Queen's Bench Division, reported 25 O. R. 50.

One Kenneth Cross made a mortgage in favour of the plaintiffs, and subsequent mortgages in favour of other persons, and afterwards conveyed the lands in question to the defendant, who covenanted to pay the mortgage moneys when and as the same became due, and to indemnify Cross and save him harmless. Cross was a partner in the firm of Scott & Cross, who, on the 30th of September, 1892, made an assignment for the general benefit of their creditors in the form provided by, and pursuant to, The Assignments and Preferences Act, R. S. O. ch. 124, the instrument being signed in the individual names. On the 31st of October, 1892, Cross assigned to the plaintiffs all benefit, advantage and right of action under the covenant

for payment and indemnity, and the plaintiffs thereupon brought this action, alleging default in payment on the 1st of October, 1892, and claiming foreclosure and a personal judgment. Several defences were pleaded, but the only one that it is necessary to refer to was that the benefit of the covenant had passed to the assignee for the benefit of creditors, and that the plaintiffs had, therefore, no right of action against the defendant personally. Statement.

The action was tried at Toronto, before ROBERTSON, J., who, on the 4th of September, 1893, gave judgment in the plaintiffs' favour; but this judgment was reversed by the Queen's Bench Division.

The plaintiffs' appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 28th of September and 2nd of October, 1894.

N. Ferrar Davidson, for the appellants. The Court below was in error in holding that the covenant for indemnity passed under the assignment for the benefit of creditors. The intention of the Assignments Act is to pass to the assignee what, without an assignment, creditors could get at. A mere right of indemnity such as is here in question could be of no value to creditors, or to any one except the covenantee and his mortgagees. It is, as it were, a covenant held in trust by the mortgagor for the mortgagees. At most, it was a mere contingent right of action, coming into being after the assignment and not within it at all: *Sutherland v. Webster*, 21 A. R. 228; *McMichael v. Wilkie*, 18 A. R. 464. It is much like after acquired property under the English Bankruptcy Act, to which the assignee must make claim; *Cohen v. Mitchell*, 25 Q. B. D. 262; *Morgan v. Knight*, 15 C. B. N. S. 669. [The learned counsel then proceeded to argue several other questions, which, for the purposes of this report, it is not necessary to refer to.]

R. U. McPherson, for the respondent. The words of the Assignments Act are wide enough to include a covenant of

Argument. this kind. It is at least a "right," and that it would pass to an assignee has been recognized in *Irving v. Boyd*, 15 Gr. 157, and this has been approved in *British Canadian Loan Co. v. Tear*, 23 O. R. 664. A mere contingent interest passes under an assignment for the benefit of creditors: Burrill's Law of Assignments, 6th ed., pp. 98, 104. *Sutherland v. Webster*, 21 A. R. 228, does not apply. The damages there were unliquidated. It is absurd to treat this as a trust for the mortgagees. Cross could at any time have released the respondent.

Davidson, in reply.

November 13th, 1894. HAGARTY, C.J.O.:—

Our statute, chapter 124, section 4, declares that the assignment shall vest in the assignee "all the real and personal estate, rights, property, credits, and effects, whether vested or contingent, belonging at the time of the assignment to the assignor." As laid down in Robson's Law of Bankruptcy, 1st ed., p. 287: "The assignee will take the bankrupt's property subject to all the burdens and equities which effectually bind it, but not necessarily subject to all the equities by which the bankrupt was personally bound."

Sir Wm. Grant, M. R., says in *Mitford v. Mitford*, 9 Ves. at p. 100: "I have always understood the assignment from the commissioners, like any other assignment by operation of law, passed his rights precisely in the same plight and condition as he possessed them. Even where a complete legal title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. This shews they are not considered purchasers for valuable consideration in the proper sense of the words."

As the Chancellor says in *British Canadian Loan Co. v. Tear*, 23 O. R. at p. 676, speaking of the vendee's liability to indemnify the vendor from an existing mortgage: "If the matter were in the shape of a covenant, unquestion-

ably it would be the subject of equitable if not legal assignment."

Judgment.

HAGARTY,
C.J.O.

In *Richbell v. Alexander*, 30 L. J. Q. B. at p. 271, Willes, J., says: "It was contended upon the authority of *Herbert v. Sayer*, 5 Q. B. 965, that until some act was done by the assignees to shew an election to take, the right of the bankrupt continued, and that such an act done by the assignees ought to have been alleged in the pleas. This argument is, however, inapplicable to the case of a right which accrued to the bankrupt before the bankruptcy or insolvency. It is in respect of after acquired property that the conditional right recognized in *Herbert v. Sayer*, and many other cases before and since, exists, subject to the active interference of the assignees. Rights which accrue to the bankrupt or insolvent before, and exist at the time of, the bankruptcy or insolvency, with an exception which is more apparent than real, of property parted with by way of fraudulent preference, in respect of which the bankrupt never had any right of action, vest absolutely in the assignees, who elect to take all rights by accepting this appointment. It follows that, in our opinion, the interest of the bankrupt passed to the assignees, of course in the same plight in which the bankrupt had it."

In *Cumming v. Roebuck*, Holt's N. P. C. 172, an action for not taking coffee sold by the plaintiff to the defendant, it was objected that at the time of the sale the plaintiff was an uncertificated bankrupt. Gibbs, C. J., held: "Unless the assignees interpose, the bankrupt may maintain the action. He may sue as their trustee."

In *Gibson v. Carruthers*, 8 M. & W. 321, it was held that the assignees were entitled to the benefit of all contracts entered into by the bankrupt, which are *in fieri* at the time of bankruptcy, and that they might elect to adopt or reject such contracts according as they were likely to be beneficial or onerous to the estate.

In the present case there was no right of action existing in Cross at the time of his assignment. No default had been made by Tennant.

Judgment.

HAGARTY,
C.J.O.

Any right or claim under this bond was acquired afterwards.

I do not see why Cross should not maintain his action against the defendant as soon as default was made by the latter in paying.

It is clear the assignees did not interpose to prevent his taking any steps in that direction.

The only interest they could have in the indemnity given by the defendant to him would be in the event of the present plaintiffs offering to prove their debt against Cross on the mortgage. In such case we can understand their interest on behalf of the creditors to obtain his security from the defendant to recoup to the estate the dividend awarded to plaintiffs.

But assuming that this security did pass to them, we can understand their acquiescence (if required) in Cross's enforcing the covenant to indemnify.

As said by Gibbs, C. J., he might be suing as their trustee ; which suggestion is noticed by Tindal, C. J., in delivering the judgment of the Exchequer Chamber in *Herbert v. Sayer*, 5 Q. B. at p. 979, followed in *Jameson v. Brick and Stone Company*, 4 Q. B. D. 208 ; see also *Drayton v. Dale*, 2 B. & C. 293.

All the text books that I have referred to seem to treat it as settled law that in respect to property acquired after the bankruptcy and the enforcing of rights also accruing after it the bankrupt may sue unless the assignees actively interpose.

Under our law the case seems to be stronger against any right in the assignees, as only property and interests vested or contingent at the date of the assignment pass.

If the case depended on the bare question whether this right to indemnity passed or did not pass I would feel much hesitation.

If Cross's claim had matured into an absolute right by the defendant's default at the date of the assignment it would be difficult to say that it did not pass, at all events so far as the protection of the estate against claims against Cross. I lean to the opinion on the whole that it did not pass.

But I think that in either alternative the defence set up by the defendant fails.

Judgment.

HAGARTY,
C.J.O.

The assignee has not interfered, and we may assume that the suit by Cross is ultimately for the benefit of the estate, and that for him and with his sanction he transfers to these plaintiffs his rights under the covenant, so as to provide for the payment of the plaintiffs' claim, which might otherwise be a provable claim on the estate.

I think, whether the claim of Cross vested or did not vest in the assignee, the latter would not be without remedy. If the plaintiffs obtained payment from the defendant, there would be an end of any right to prove on the estate, and so all interest of the estate in the claim to indemnity would be at an end.

I think that there is nothing shewn in the alleged dealings between Cross's firm and the defendant's firm to bar the plaintiffs' right. They are strangers to these dealings, and can rely on their right to recover solely on the title deeds before us relating to their mortgaged land.

BURTON, J.A. :—

Not without much hesitation I have come to the conclusion that such a covenant as was given by the defendant to the insolvent in this case did not pass to the assignees under the assignment for the benefit of creditors. The language of the Act in referring to personal property, "which may be seized and sold under execution," shews that what was intended to pass were assets which could be realized for the payment of the insolvent's debts.

So far as it is a covenant of indemnity it is clearly not an asset, and even as a covenant to pay, if it passed to the assignees, the money when collected would be the money of the mortgagee and not of the creditors.

The fact that no case can be found in which such a covenant, or right, has been held to pass to an assignee in bankruptcy, is a strong argument against its passing.

Now, if there had been no insolvency, Cross, who held

Judgment.
BURTON,
J.A.

the covenant and who had the sole right to deal with it as he thought proper, might have made a present of it to the maker of it. The mortgagee would have no right to complain, and no one else had any interest in it. I do not think the matter is altered by reason of his insolvency—the creditors whom he represents have no different right in that respect than they had before his insolvency. It has always appeared to me that an assignment to any one but the person for whose benefit it could be enforced was an idle proceeding; but that the equity of the mortgagor to compel his assignee to pay would pass by express assignment to the mortgagee. It would, as in this case, simplify the remedy for the recovery of the mortgage money, and create the privity which alone was wanting to make such an action maintainable.

This decision does no wrong to the insolvent's estate; in fact it does not appear that the assignees have ever asserted a right to claim the covenant, and the plaintiffs, having the covenant, cannot rank on the estate without valuing it.

The question of set-off was, as I understand it, disposed of on the argument.

The appeal should be allowed and Mr. Justice Robertson's judgment restored.

MACLENNAN, J.A. :—

Besides the ground on which the judgment was rested by the Divisional Court, it was supported on argument before us by the contention that even if there had been no assignment for creditors, the plaintiffs could not have recovered by reason of set-off or equities existing between the assignor Cross, and the defendant, James Tennant, at the time of the assignment of the covenant in question to the plaintiffs, R. S. O. ch. 122, s. 11.

[The learned Judge discussed the evidence, coming to the conclusion that there was no right of set-off.]

The other question is as to the effect of the general assignment for creditors made by Scott & Cross before the assignment of the covenant to the plaintiffs.

The Divisional Court has held that the assignment for creditors passed not only the property of the firm but the individual property of the partners as well, and in that respect I agree with the decision. The Divisional Court also held that the covenant in question as part of the individual property of Walter Cross also passed to the assignee, which is not so clear. It is to be observed that the covenant applied not merely to the two mortgages in which the plaintiffs were interested, but to three other mortgages, namely, one to Thomas Caswell for \$400, one to Bartle E. Bull for \$950, and one to J. M. Duggan for \$80, all of which the defendant covenanted to pay. It is also important to remember that when the assignment to creditors was made there was nothing in arrear on the plaintiffs' mortgage, the defendant having paid the instalment of interest which had fallen due on the 1st of April, and the next payment did not become due until the 1st of October. When the assignment was made, therefore, Cross had no cause of action in respect of the plaintiffs' mortgage, and might never have. That cause of action accrued on the following day, and it may be difficult to perceive how this unbroken covenant could be regarded as within the words, "rights, property, credits and effects," employed in section 4 of R. S. O. ch. 124, the Assignments Act.

Judgment.

MAOLENNAN,
J.A.

At the time of the assignment, however, there was a default in respect of the mortgage to one McCraney, interest upon which had fallen due on the 3rd of August, which the defendant had not paid, as he had covenanted to do. By reason of that default Cross had a right of action against the defendant on the covenant at the time of his assignment on which he could have recovered a sum of money equal to the unpaid interest. It may be argued that that sum of money and the right of action therefor came plainly within the words of the statute as "rights, property, credits and effects"; but even as to this there is the difficulty that the defendant had the right not only before action but even at any time before

Judgment.
MACLENNAN,
J.A.

actual payment to Cross to relieve himself by paying it to the mortgagee and not to Cross, and perhaps even after payment he could compel Cross to pay that very money to the plaintiffs in discharge *pro tanto* of the encumbrance on his land. It is difficult, therefore, to see how, even in that case, anything beneficial to the creditors could pass to the assignees.

If the covenant did not pass to the assignees, the case is free from all difficulty, the defence fails and the appeal must succeed. But I will suppose that for some purpose the covenant did pass to the assignee ; that inasmuch as the covenant was really worth to Cross all the money which the defendant thereby agreed to pay, it was a valuable asset which the Legislature intended should pass. By means of it he could pay several considerable debts, just as if the defendant owed him an equivalent sum of money. Then on the assumption that it did pass, what was the effect of it ?

An assignee for creditors is a trustee, not only for the creditors but also for the debtor. It is his duty to make the most of the estate, and pay the debts ; but it is the debtor's estate all the time ; and when the debts are paid, it is his duty to restore the surplus, or what is not required for debts, if there be any, to the debtor. The assignee is accountable to the debtor for his dealings with the estate, and if he is guilty of any wrong-doing or breach of trust, or if he neglects or refuses to do any duty in respect of the estate, he can be held to his duty and be compelled to perform it at the debtor's instance. The covenant in question was a counter security which the debtor possessed to protect him against the claims of the plaintiffs and others. The only use which could be made of it, either in the debtor's hands or in the hands of the assignee, was to compel the defendant to pay the plaintiffs and the other debts, and when it passed to the assignee, he took it and held it in trust for that purpose and no other. Until the plaintiffs came forward to prove against the estate, the assignee was a bare trustee for the debtor. Until they did prove, and

they might never care to prove, the assignee could make no use of the covenant whatever in any person's interest but the plaintiffs'. It is clear, therefore, that the debtor still had an interest in the covenant notwithstanding the assignment, and that interest was the right to have it enforced against the defendant the moment anything fell due on the mortgage. That beneficial right he could assign and transfer to the plaintiffs to the extent of their interest; and I think it was so transferred by the assignment of the 31st of October, 1892.

Judgment.
MACLENNAN,
J.A.

Then what was the effect of the assignment to the plaintiffs? They were the persons entitled to the money which the defendant had covenanted to pay, and by the assignment the right to the money and the equitable right to compel its payment became vested in the same persons, the mere legal right, if anything, being in the assignee in trust for them.

That being so, the action is brought by, and it is the case of, *cestui que trust* suing in his own name without joining his trustee. Formerly, that would be objectionable for want of parties, but since the Judicature Act, unless the objection is cured by an application to add the trustee, such an action is good enough. The want of the trustee is no defence, for the defendant himself can have him added as a party.

It is perfectly clear, in my opinion, that after the plaintiffs obtained the assignment from the debtor, they could at once have required the assignee to sue, or to allow the plaintiffs to sue, on the covenant, or if not, could themselves have sued on it, making the assignee a co-defendant for the recovery of the money, and the sole objection to the present action is one of parties.

It may be worth while considering how it would have been if the plaintiffs, instead of suing the defendant, came to prove their mortgage debt against the assigned estate. If they had done that before they obtained the assignment of the covenant, the assignee could have sued the defendant in the interest of the other creditors, in order

Statement.

On the 15th of September, 1892, Puddicombe paid to the corporation \$10, "being nominal rental commuted for the use of Henry street sewer," and he then connected his house drain with the Henry street drain.

By a by-law of the corporation, every dwelling-house was required "to be drained into the common sewer where there is a common sewer within 100 feet of it."

It was proved that the Bruce street drain had been flushed by the corporation, and that a water-closet in a fire-hall was connected with it.

Both defendants were assessed annually by the corporation for sewage rates.

The action was tried at London, on the 30th March, 1894, before MEREDITH, J., who, on the 3rd of May, granted the plaintiffs an injunction with a reference as to damages.

The defendants' appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 2nd of October, 1894.

Gibbons, Q. C., for the appellant, Alexander. The evidence shews clearly that the corporation has adopted this drain as part of the sewage system of the city, and, therefore, the city alone is responsible: *Ferrand v. Hallas Land and Building Co.*, [1893] 2 Q. B. 135.

E. R. Cameron, for the appellant, Puddicombe. Puddicombe's position is even stronger than that of Alexander, for there is in his case the direct recognition by the city of his right to use the drain. The mode of construction shews that these so-called drains were really intended to be used as sewers.

M. D. Fraser, for the respondents. The drain in question was evidently constructed for the purpose of surface drainage only, and its true nature cannot be changed by its wrongful user. Its use for sewage purposes has never been recognized by the city, but it has always been treated merely as a drain, and the plaintiffs have no remedy against the city: *Gray v. Dundas*, 11 O. R. 317, 13 A. R. 588,

though the defendants may possibly have a remedy over. **Argument.**
But even if the plaintiffs have a right of action against the city, that is no bar as against these defendants, who are in any view joint *tort feasers*. In *Ferrand v. Hallas Land and Building Co.*, [1893] 2 Q. B. 135, there was direct authority from the corporation to use the drain, and the case turns on that. The general direction to connect with "sewers," does not apply to a "drain," and does not make the city liable: *Attorney-General v. Guardians of Dorking*, 20 Ch. D. 595; *Attorney-General v. Clerkenwell Vestry*, [1891] 3 Ch. 527; *Ogilvie v. Blything Union Rural Sanitary Authority*, 67 L. T. N. S. 18.

Gibbons, Q. C., in reply.

November 13th, 1894. HAGARTY, C. J. O.:—

The plaintiffs sue two individual householders in the city of London for sending filth from water-closets into a drain or sewer which has its outlet on the plaintiffs' property, to their injury. It is objected that no action lies against them, and that the municipality of the city is alone responsible.

The adjoining township of Westminster made a covered drain on a certain road or street for ordinary drainage purposes, assessing the adjoining owners therefor. Afterwards, by legislative authority, all that portion of land on which the drain was, became part and parcel of the city, and the plaintiffs and the defendants and their respective properties became within the city.

I am unable to see the importance of the enquiry as to the origin, object, history, etc., of this township drain or sewer. I think we have only to regard the dealings of the city therewith.

Whether it was an open or covered drain—a mere trench in the highway or many feet below the surface—the question seems to be what use is the city municipality making of it, or what have they done with it, and have they changed its character from a mere ordinary water or

Judgment.

**HAGARTY,
C.J.O.**

surface drain into a public sewer for receiving all kinds of drainage from houses or water-closets. I think under the Municipal Act the corporation had full control over all drains or sewers within their limits to make, or unmake, enlarge, or alter the same.

We are not now discussing whether by such proceedings they may injure the plaintiffs' properties. If so, it may be presumed they may incur certain liabilities to them to be satisfied either by compensation proceedings or by action.

The question is as to these defendants being personally liable to the plaintiffs.

It appears that the municipality constructed drains fit or intended for carrying away filth from water-closets, and altering or connecting with the old Westminster drain along Bruce street.

This they had, as I think, an undoubted right to do, and in the present case, it seems to me to be beside the question to discuss how and with what formalities they did the work. It is sufficient to say that they did it.

It seems beyond question on the evidence that the corporation designed the new sewer to be the receptacle of the contents of privies, etc., and made regulations requiring parties so to drain their premises under certain declared regulations.

Both defendants have been assessed for sewage rates. One obtained formal permission so to drain. The other has had his connection with the Bruce street sewer for some time, commencing before being brought into the city, without any objection by the municipal authorities before or after the extension of the city limits.

We must not confound this case with any alleged fouling of a running stream or natural watercourse.

All the defendants do is to use the sewer belonging to or constructed by the city by draining into or depositing the filth therein. When once so deposited it is wholly beyond their control. It is the action of the corporation that sends it down to the plaintiffs' land.

The city may turn it at their pleasure into any other direction or outlet.

It is shewn in the plaintiffs' evidence that the first large deposits occurred when the sewer was flushed out by the city authorities, and the nuisance became much worse after this flushing. The evidence shews that there must have been a very large use of this sewer for water-closet drainings. The plaintiffs say they noticed it in smaller quantities two or three years ago.

Judgment.
HAGARTY,
C.J.O.

That the sewers made by the city were constructed expressly as fitted for carrying such sewage is clear from the evidence, and were flushed by the city officials.

The original Bruce street sewer is said to have also been adapted for carrying away sewage by fifteen inch glazed tiles.

It appears to me that it is unnecessary to discuss the relative meanings of "drain" and "sewer."

Whatever may have been the correct description of the old Bruce drain when it came within the city's jurisdiction and became a component part of it, the municipality of London have used and treated it as a public sewer by connecting with it their own sewers, constructed expressly as sewers and designed to drain water-closets, and it seems to me clear that it is then to all intents and purposes a common sewer for those purposes.

In that view, I cannot see how these defendants can be held answerable.

In the case cited by Mr. Gibbons, *Ferrand v. Hallas Land and Building Co.*, [1893] 2 Q. B. 135, are these words (p. 140): "The moment the sewage has gone through the drains into the sewer, the property in it is taken out of the landowner who made the sewer, and is vested in the local authority, and the land owner has lost all control over it. * * That being so, how can it be within the bounds of reason to enjoin him from doing that which he cannot help doing?" And also the judgment of Lord Justice Smith on page 143, where he says: "It appears to me that, if the sewer be vested in the local authority, and the defendants have the sanction of that authority for doing what they have done, this action is not maintain-

Judgment.

**HAGARTY,
C.J.O.**

able; for if it were, every householder, whose house is drained into a sewer which is vested in and is under the control of the local authority, would be liable to be proceeded against for what that authority might do with the sewage which flowed out of the mouth of the sewer, although the householder was unable to direct as to how and in what way that sewage was to be dealt with. It is immaterial who originally constructed the sewer; when once the sewer was vested in the local authority they are the persons liable for the injury caused by the effluent from the sewer, and not the persons who drain into the sewer."

That case was under the Imperial Act, the Public Health Act of 1875, by which all existing and future sewers were vested in the local board of health, and it was held that the defendants were not liable. Here the sewers in question are wholly under and subject to the jurisdiction of the municipality.

It seems to me that for all injuries alleged by the plaintiffs the defendants are not individually liable; they are fully represented by the city municipality, who must stand between the inhabitants or ratepayers for all the consequences of the action or result of such public works controlled by them for the general purposes of the city.

OSLER, J. A. :—

It is proved that the Bruce street drain was constructed while the road or street through which it passes was still in the township of Westminster for the purpose of taking off surface water from the adjoining lands, and the only servitude the plaintiffs consented that their land should be subject to was that of receiving such water discharged thereon through the drain. As originally constructed, therefore, it could not properly be described as a common drain or sewer, by which is now generally understood a drain for carrying off not merely inoffensive superfluous or surface water, but also foul water and excrementitious

and other filthy matters which pass into it and are intended thereby to be carried away from human habitations. As regards the Henry street drain, however, I see no evidence of any such restricted purpose, or of its having been constructed by the city to serve any other purpose than that of a general or common drain or sewer. The reasonable inference is, that it was so constructed and used as such with the consent of the city authorities, and this alone is some evidence that the city had also adopted and assented to the use of the Bruce street drain for a similar purpose, because, as I understand it, the Henry street drain is connected with and discharges directly into that drain. Evidence, moreover, of a more direct adoption by the city and its consent to the user of the Bruce street drain as a common drain or sewer is not wanting. The defendant, Alexander, no doubt connected his closet with that drain before the territory in which it was constructed was taken into the city limits; but it was shewn that since then the defendant had been paying rates for the use of the city water for closet purposes, and that in the city fire hall there was also a closet connected with it, and I think it might reasonably be inferred that such closet was in ordinary use. It was also proved that others were, in fact, using it for a similar purpose, though the evidence stopped short of shewing the actual consent of the city in those cases.

Judgment.

OSLER,
J.A.

The drains in question then being the property of the city, constructed in their streets, the city having legal authority to construct common sewers therein, and there being, as I respectfully think, evidence of their use as such with the assent of the city, it appears to me to follow that the drains are common sewers of the city, and that for any damage the plaintiffs sustain by the discharge of sewage therefrom, which must be regarded as the sewage of the city, and not of any particular inhabitant, the action must be brought against the former alone, and that the defendants are not individually responsible.

The appeal must therefore be allowed.

Judgment. **MACLENNAN, J. A. :—**

**MACLENNAN,
J.A.**

After some fluctuation of opinion I think that this appeal ought to be allowed.

The Bruce street drain was constructed of glazed tile fifteen inches in diameter, the tiles connected by collars, closed with clay or cement. There were gully holes on both sides of the street at crossings, and openings left for the purpose of connecting with houses on each side of the street. It was put down six to eight feet deep. Nevertheless, I think it was not originally a sewer in the strict sense. It was constructed while the land was without the city and under township jurisdiction, for mere surface or water drainage, and that being its purpose the plaintiffs consented to allow it to discharge upon their land. Obviously they would not have consented if it had been intended to discharge sewage.

The Municipal Act of 1883, which was the Act in force when the drain was constructed, authorizes townships as well as cities to open, make, etc., drains, sewers and water-courses: section 482 (15); but when authority is given to make drains to be paid for by local rates the language is not so wide—the expression is drainage of property: section 570; and the context is indicative of a dealing with ordinary surface water only. On the other hand, by section 612, cities, towns and incorporated villages were authorized to make, enlarge or prolong any common sewer by local rates.

The work in question was done under section 570, by local rate; and the by-law recites the petition to have been for the construction of a *sewer* for the purpose of draining the lots; but in the subsequent parts of the by-law the word “sewer” is not again used.

In the year 1890, however, the city limits were extended to include this locality, and this street and drain came under the city's jurisdiction, and I think the city has, as it had undoubted power to do, adopted this drain for a public sewer, and that it is now of that character, in fact and in law.

On the 4th of July, 1892, the city council passed a by-law on the request of the property owners on a street called Henry street, for the construction of a drain on, upon and along that part of Henry street which lies between James street and Bruce street, under the superintendence of the city engineer; and the drain was duly constructed, connecting with the Bruce street drain for its outlet. This new drain is a ten-inch drain constructed in other respects like the Bruce street drain, and when the city health by-law is regarded requiring all owners of dwelling houses to cause their privy pits, closets, etc., to be drained into the common sewer there can be no doubt of the object, purpose and character of the work. Immediately afterwards the defendant Puddicombe applied to the council for and obtained permission to connect with this drain, and that is what is complained of as against him in the present action.

Judgment.
MACLENNAN,
J.A.

I think all this shews that the Henry street drain is a common sewer, and that the city authorities have elected to use the Bruce street drain also as a common sewer; and I think that from that time, if any nuisance has resulted to the plaintiffs, the responsibility, whatever it may be, rests with the city, and not with the defendants; and that the case is governed by *Ferrand v. Hallas Land and Building Co.*, [1893] 2 Q. B. 135.

I therefore think that the appeal should be allowed, and that the action should be dismissed with costs.

BURTON, J. A. :—

The learned trial Judge has found that the drains in question were not public sewers in the ordinary acceptance of that term, and there is abundant evidence to support the finding.

The Bruce drain was constructed when the tract formed part of the township of Westminster under a by-law passed in compliance with a petition of the ratepayers for the purposes of draining the lots on both sides of Bruce street,

Judgment.

BURTON,
J.A.

and roads, lots, and parts of lots benefited were assessed in terms of the Act.

This property was afterwards brought within the limits of the city, but the tax imposed under this by-law was levied year by year after it was incorporated with the city, until the expiration of the ten years originally fixed.

It is scarcely necessary to say that the character of the drain was not changed by being brought within the city, nor by its being described as a sewer.

I do not at all question their power to adopt it as a sewer if they thought proper, nor do I doubt that they might by consent estop themselves from denying that it was a common sewer if sued for injuries sustained.

The defendant Alexander admits that he connected his closet with the drain before the property was brought within the city, and without authority from any one.

It was said that the city had itself treated it as a public sewer by connecting the closets in the fire hall with it, but there was no evidence of user, and the learned Judge who saw the witness came to the conclusion that there were no facts from which such an inference could be fairly drawn.

Then as to the Henry street drain the evidence is very meagre, but the by-law under which it was constructed speaks of it as a drain connecting, as I understand it, with the Bruce drain, which the learned Judge finds not to be a public sewer.

The defendant Puddicombe connected with his father's drain pipes, which again connected with the Henry street drain, but it is not shewn by what authority the latter connected with that drain, and Puddicombe admits that he never applied for, and never obtained any authority from the city engineer, but there is a minute of council that "he be granted permission to connect with Henry street drain from his property on Wortley road on agreeing to pay a nominal rent for said privilege, to be fixed by the city engineer, and on promising not to oppose the construction of a drain on Wortley road property at present occupied by him."

The fact that a nominal rent was imposed tends rather to shew that there was no intention on the part of the city to allow the applicant to empty his closet into the drain, and the by-law prohibits any such connection except by the permission of the city engineer.

Judgment.
BURTON,
J.A.

No resolution of the city adopting these drains as common sewers is shewn.

Upon this state of facts it is not surprising to find that the learned Judge held that although the drains or sewers in question were vested in the corporation of London, the defendants were liable, because it was not shewn that they had the sanction of the city authorities for doing what they did. I think that whether it is a drain constructed for the mere purpose of carrying off surface water or not, if the city authorities sanctioned such a use of it as is complained of, they, and not the defendants, would be liable, but in the absence of such evidence I do not see that the defendants have any answer to the complaint.

If the plaintiffs had sued the city, I do not see how they could have succeeded upon this evidence.

I do not agree with the respondents' argument that the defendants have a remedy over against the city. If they are not liable it is upon the ground that what they have done has been done with the sanction of the city who control the sewers, and who alone, in that case, would be liable to be sued.

I think that the judgment should be affirmed and this appeal dismissed.

Appeal allowed with costs,
BURTON, J.A., *dissenting.*

Judgment.
HAGARTY,
C.J.O.

ing against a wall. From some unexplained cause it falls and hurts the plaintiff. As is often said, such things do not fall of their own accord, and the fact of falling should be fully enquired into.

My impression is that such a case should not be dismissed merely because some positive evidence is not given as to the cause of falling.

The plaintiff does not know the cause, but merely proves the falling to his injury, and that no fault or act of his contributed to the fall.

I think, without necessarily applying the rule "*res ipsa loquitur*," a case is made for inquiry on the part of the defendants or their servants, to shew if possible, all about the placing of the article in its position, and the manner and purpose for which it was used or secured in a shop frequented by customers. It might be, that after full examination of all parties knowing anything of the matter, no satisfactory cause of falling would be discoverable.

We are not dealing with such a state of the case, but only with the propriety of the trial Judge stopping the case at the stage he did.

The words of Bramwell, B., are worth repeating: "Looking at the matter in a reasonable way it comes to this—An injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell the jury. * * No doubt, the presumption of negligence is not raised in every case of injury from accident, but in some it is. We must judge of the facts in a reasonable way; and regarding them in that light we know that these accidents do not take place without a cause, and in general that cause is negligence." Of course we must remember that these remarks were made in the well known *Byrne v. Boadle*, 2 H. & C. 722, as to the barrel falling from the warehouse. But the words quoted may be properly considered as applicable generally.

Briggs v. Oliver, 4 H. & C. 403, may be also referred to. A large package raised against the wall fell upon and in-

jured the plaintiff. Pigott and Bramwell, BB., held that there was a case for recovery.

Judgment.

HAGARTY,
C.J.O.

Pigott, B., says (p. 406): "The packing case fell on the plaintiff, and, as I infer, fell by its own weight, and from having been propped up insecurely, since there was no evidence that it was disturbed in any way so as to cause its fall. These facts are, I think, evidence of the defendants' negligence."

Bramwell, B., says (p. 407): "Packing cases carefully placed in a proper position do not naturally tumble down of their own accord. * * I think this is one of those cases in which, as has been said, '*res ipsa loquitur*.'"

Martin, B., dissented.

Scott v. London and St. Katherine Docks Co., 3 H. & C. 596, may be noticed on the general question of proof of negligence. Blackburn, J., says (p. 600): "There is an old pleading rule, that less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading. Applying that here, is not the fact of the accident sufficient evidence to call upon the defendants to prove there was no negligence?"

The rule is laid down by Erle, C. J., that where the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. See Pollock's Law of Torts, 3rd ed., p. 393, where this rule is quoted.

I think that the appeal must be dismissed.

BURTON, J. A. :—

This case seems to come within the language of Erle, C. J., when expressing the opinion of the majority of the Judges in the Exchequer Chamber in *Scott v. London and St. Katherine Docks Co.*, 3 H. & C. 596: "There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or

Judgment.
BURTON,
J. A.

his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

In that case, however, the Chief Justice and Mellor, J., thought that there was no reasonable evidence of that negligence which was apparent to the rest of the Court.

I think this case is very near the line, and I do not wonder that my learned brother hesitated to allow it to go to the jury, and I hope that when the case goes down again fuller evidence will be forthcoming.

MACLENNAN, J. A. :—

I think that the appeal should be dismissed.

Mr. Shepley's argument, as I understood him, was that it should have been proved that the child did not touch the mirror. He said there were just two alternatives. It must have been insecurely placed, or the child must have pulled it, and it is equally consistent with the evidence that it fell from either cause. I think the answer to that is, that there was no evidence whatever of the second alternative, and, therefore, the accident must have been due to the other. Why should the plaintiff be obliged to negative his own intervention? The plaintiff was near the mirror; it fell upon him; that alone is evidence of its having been insecurely placed, and there being no other evidence, it is the proper conclusion. We need not say what the law would be if there was evidence that the child pulled the mirror down. If we did, it would be mere dictum, unnecessary for the decision of the point before us.

OSLER, J. A. :—

I agree.

Appeal dismissed with costs.

. ROBERTS V. THE BANK OF TORONTO ET AL.

Lien—Artisan's Lien—Brick-maker.

A brick-maker who makes bricks for another person in a brickyard belonging to that person and has possession of the yard while engaged in making the bricks, is entitled to a lien upon them as against an execution creditor or chattel mortgagee of the owner.

Judgment of BOYD, C., 25 O. R. 194, affirmed.

THIS was an appeal by the defendants from the judgment of BOYD, C., reported 25 O. R. 194. Statement

The plaintiff was a brick-maker, and brought the action for a declaration that he was entitled to a workman's lien upon bricks made by him for one Robertson in a brickyard owned by the latter. Robertson gave to the defendants, The Bank of Toronto, a chattel mortgage upon all the bricks made or in course of manufacture, and afterwards made an assignment for the benefit of creditors to the defendant Gardner. Before this assignment, the bricks had been seized by the sheriff under an execution against Roberts's goods.

The action was tried at Toronto, on the 16th of April, 1894, before BOYD, C., who, on the 18th of April, 1894, gave judgment in the plaintiff's favour.

The defendants appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 1st of October, 1894.

W. Nesbitt, and *R. McKay*, for the appellants The Bank of Toronto. The respondent was, under his agreement with Robertson, bound to deliver the bricks before any right to payment arose. He could, therefore, claim nothing until possession was relinquished by him, and a right of lien never arose. Besides, he was not at any time in exclusive possession, and to support a lien exclusive possession must be shewn. The cases of *King v. Indian Orchard Canal Co.*, 11 Cush. 231; and *Shaw v. Kaler*, 106 Mass. 448, cited

Argument. in the judgment appealed from, are explained in Jones on Liens, 2nd ed., secs. 20 and 25. Moreover, the rights of these appellants arose *eo instanti* of the time of manufacture, and Robertson never was an absolute owner, and was, therefore, never a person against whom a lien could attach: Jones on Liens, 2nd ed., sec. 745; *Globe Works v. Wright*, 106 Mass. 207. In *Moore v. Hitchcock*, 4 Wend. 293, also relied on below, there was an actual agreement to give a lien. The English cases, collected in Roscoe's *Nisi Prius*, 16th ed., p. 980, shew that there must be exclusive possession, and that relinquishment of possession, even "for a moment," is fatal: *Hughes v. Lenny*, 5 M. & W. at p. 187.

E. Bristol, for the appellant Gardner.

E. Myers, and *W. J. Clark*, for the respondent. It is admitted that a brick-maker is a person who may have a lien, and nothing has been proved to deprive the respondent of his right. *Moore v. Hitchcock*, 4 Wend. 293, is on all fours with this case. It is not the law that there must be exclusive possession. The question is whether there has been reasonable control: *Chase v. Westmore*, Tudor's Leading Cases on Mercantile Law, 3rd ed., at p. 382. *In re Merrick*, 51 N. W. Rep. 890, is very like this case, and there a manufacturer of salt was held entitled to a lien, although delivery was part of the bargain. So also a lien was upheld for sawing lumber in *Chadwick v. Broadwell*, 27 Mich. 6, and payment from time to time was held not fatal.

W. Nesbitt, in reply.

November, 13th, 1894. HAGARTY, C. J. O. :—

I think that the learned Chancellor's findings are well and sufficiently borne out by the evidence of the plaintiff and several of his workmen, nor is such possession substantially denied by Robertson.

I think the possession of the yard and bricks made there was shewn as fully as such a thing could be reasonably expected or proved as to a place on which there is no building.

I refer to the evidence on this point.

Judgment

What position then did the plaintiff occupy? He was lawfully on Robertson's ground in the portion marked off for his work. He was certainly not there as a trespasser.

HAGARTY,
C.J.O.

As between him and Robertson he was there at least by license to do a specific work under contract, not as a mere servant or labourer, and as against a mere wrongdoer I presume he would have a right to restrain trespass on his possession, or on the bricks he was making.

He was lawfully there under license, and such license was never revoked, assuming that it was a revocable license.

As to the alleged interference with this possession by Robertson in selling portions of the brick, I think the evidence fully warrants the conclusion that this was done with the plaintiff's assent and by arrangement, and to obtain money to pay the plaintiff and his men as agreed on.

I cannot see why the plaintiff's assent or permission so to sell could destroy his right of lien on all that remained.

A man having eight horses of another, or 100 barrels of flour, in his possession, on which, either by agreement or by common law, he had a lien, may, I suppose, allow the owner to remove part of the number for the declared purpose of selling to satisfy the lien, or generally to sell without affecting his lien on the portion remaining.

I have examined the three American cases cited by the Chancellor. *Moore v. Hitchcock*, 4 Wend. 293, is the earliest. I think it supports the plaintiff's claim on the general law. *King v. Indian Orchard Canal Co.*, 11 Cush. 231, is clearly distinguishable on the fact of possession. This case is noticed in Jones on Liens, 2nd ed., sec. 25. In *Shaw v. Kaler*, 106 Mass. 448, the plaintiff, a mechanic, in a place assigned to him in the employer's shop, made piano cases at an agreed price out of material found by the employer, and the plaintiff employed workmen to assist him. He there retained actual possession of the cases, and the defendants claiming under some mortgage against the employer seized the goods. The plaintiff recovered.

The case before us was contested chiefly on the question

Judgment. of sufficient possession. The possession seemed better, I
HAGARTY, think, than that in the last case of *Shaw v. Kaler*, 106
C.J.O. Mass. 448.

If the owner of a farm had a clump of trees in one of his fields, and agreed with a man to cut down and chop the timber into prescribed lengths at named prices, and the man entered on the clump or grove, and with his men remained working daily and manufacturing the timber as agreed, I do not see, until some interference or revocation of the license to enter and do the work, why the workman should not have his lien for payment.

The possession necessary to entitle him to his common law lien must be such a reasonable, clear and actual possession as the nature of the case will admit.

I think such a possession has been shewn here with reasonable certainty, and it has been found as a controverted fact in favour of the plaintiff.

I think that the claim is eminently just and fair, and I hope that there is no legal objection to its being enforced.

OSLER, and MACLENNAN, JJ.A., concurred in dismissing the appeal.

BURTON, J. A. :—

The Supreme Court has laid down a rule which makes it almost treasonable to overrule a judge of first instance on a question of fact. If the rule had not been quite so stringent, but had laid it down that much weight was to be given to the decision of a judge who had seen the witnesses, and that that decision was not to be lightly interfered with, it would have accorded more with my own notions, and with what I understand to be the course pursued by the Court of Appeal in England.

The decision is binding upon me, and in deference to it, and solely on that account, I am for affirming the judgment. I must independently have come to the conclusion that the plaintiff was in the employ of the owner of the

land; and that Robertson was in possession until the execution was issued, when a change was attempted to be made.

Judgment.

Taking the view I do of the evidence I did not feel justified in giving a silent affirmance.

BURTON,
J.A.

Appeal dismissed with costs.

BADCOCK V. FREEMAN.

Negligence—Evidence—Damages—Nonsuit.

Where a workman was killed by the explosion of a tank in which refuse was being boiled into soap and there was no direct evidence as to the cause of the explosion, evidence of experts who had examined the tank, stating that the screws fastening the tank cover were defective, and that the explosion was probably due to this cause, was held sufficient to justify the submission of the case to the jury.

Judgment of the Chancery Division affirmed.

This was an appeal by the defendant from the judgment of the Chancery Division. Statement.

The action was brought by the plaintiff, as administratrix of the estate of her husband, to recover damages for his death. He was a workman employed by the defendant and was killed by the explosion of a tank in which refuse was being boiled down into soap. The action was tried at Hamilton, on the 5th of September, 1893, before ARMOUR, C.J., and a jury, when the jury disagreed. A motion was then made before the Chancery Division to enter judgment for the defendant on the ground that there was no evidence of negligence. The deceased was alone when the accident occurred and there was no direct evidence of its cause. The tank in question was a large iron one through which steam-pipes passed and the heavy iron cover was fastened on by a number of bolts and nuts. It was the deceased's duty to screw on the cover and then turn on the steam, the screw for turning it on being so placed as to make it necessary for the workman to lean

Statement. over the tank to reach it. After the explosion the deceased was found lying dead beside the tank with the top of his head blown off. The tank was not broken but the cover had been blown off. Some of the bolts had been broken, others were unbroken. The defendant's theory was that the deceased had negligently turned on the steam before screwing on all the bolts. The plaintiff's theory was that the explosion was caused by gas or steam and occurred after the deceased had screwed on the cover and was leaning forward to turn on the steam. Some mechanical experts were examined and they testified that the bolts were not sufficiently strong, as more fully explained in the judgment.

The motion was dismissed by the Chancery Division, and the defendants appealed, the appeal being argued on the 25th and 26th of September, 1894, before HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, JJ.A.

W. Nesbitt, and A. Monro Grier, for the appellant.
G. Lynch-Staunton, for the respondent.

November 13th, 1894. The judgment of the Court was delivered by

HAGARTY, C.J.O. :—

It must be noticed that the sole question for us is whether there was evidence for the plaintiff sufficient to be submitted to the jury, or whether the Judge should have, as a matter of law, directed the dismissal of the claim.

The plaintiff contended that the cover of the tank was not properly or securely fastened to the tank, so as to resist the pressure of gas and steam from within. This was the substance of the complaint.

The deceased was in charge of the tank and boiler. An explosion took place about seven in the evening. The witness who first entered on the alarm, saw steam rushing out of the tank room window. He found deceased

lying about a yard from the tank—the top of his head blown off. The cover was blown off the tank. The allowed pressure was forty pounds, at which the safety valve blew off. This seemed to be the marked pressure at the time of accident. This cover had to be screwed off and on the tank. The deceased had to do this. It was secured by about thirty bolts. They had been in use over four years. The deceased was said to be a careful man, and had been at the work nearly a year.

Judgment.

HAGARTY,
C.J.O.

The plaintiff chiefly relied on the evidence as to the bolts not being originally sufficient or having become worn by use.

Two mechanical engineers were called who examined the bolts. They considered the bolts not sufficient; should have been inch bolts and not, as they were, three-quarter-inch. They certainly condemned the bolts as unfit or unsafe for the purpose, and that inch bolts would not have exploded on forty pounds pressure; and the witnesses believed they broke from insufficiency and deterioration from constant use, and that they could not be taken off and on, as it was shewn they were, with safety three times a week.

The defendant and one engineer and others were examined at length, and much difference of opinion shewn. It was also urged that the deceased by his own carelessness may have contributed to the fatal explosion.

I abstain for obvious reasons from commenting on the strength or weakness of the evidence adduced on either side, but I am of opinion that the learned Chief Justice was right in leaving the determination of the case to the jury. I think there was evidence proper to be considered by them in its various aspects.

The two experts' evidence suggests a cause for the explosion. Of course, in the absence of direct testimony in such cases as this, there must generally be a great deal of mere opinion as to the cause of injury. Mere conjecture will not answer, unless it be based on proved facts on which the opinion is based.

Judgment.

HAGARTY,
C.J.O.

We are constantly referred to *Wakelin v. London and South Western R. W. Co.*, 12 App. Cas. 41, where the deceased was found lying dead between two railway tracks and no explanation whatever could be given as to the accident.

Where a man is found dead beside an exploded head of a tank under his charge, and persons examining it declare that the fastenings were insufficient, under the circumstances, to stand the pressure upon them, I do not see how we are to treat their opinion as to the cause of explosion as mere guess work and conjecture, so vague as to be unfit to be submitted to a jury. I do not wish even to hint any opinion as to the merits of this case on the whole evidence ; I merely hold that it was for the jury to weigh all the evidence and decide on the many questions involved, and as to deceased's alleged contribution to the accident.

Appeal dismissed with costs.

.

THOMPSON V. WARWICK.

Mortgages—Assignment—Consolidation.

Mortgagors of land sold it subject to the mortgage, the purchaser giving them a second mortgage to secure part of the purchase money. He then sold the land subject to both mortgages, which his sub-purchaser covenanted to pay off. Subsequently, the first mortgagors, under threat of action, paid the claim of the first mortgagees, and took an assignment of the first mortgage to one of their number :—

Held, that the sub-purchaser, on being called on by the first mortgagors and first purchaser for indemnity against the first mortgage, was bound to pay it, and was not entitled to an assignment thereof, without also paying the second mortgage.

Judgment of BOYD, C., affirmed.

THIS was an appeal by the defendant from the judgment of BOYD, C. Statement.

By deed dated the 5th of March, 1889, John Kerr and Robert Jenkins conveyed to the plaintiff, Thompson, certain lands in Toronto, subject to a mortgage thereon, made by them in favour of The Toronto Land and Investment Corporation, securing \$2,000 and interest. This mortgage the plaintiff assumed and agreed to pay off. On the 11th of March, 1889, he gave to Kerr and Jenkins a second mortgage on the same lands to secure \$700, part of the purchase money.

On the 10th of April, 1889, the defendant, by agreement of that date, agreed to buy from the plaintiff the lands in question for \$6,216. "Terms: \$1,200 cash on completion of title; \$1,000 on the 15th day of October, 1889; \$1,400 on the 15th day of April, 1890, and to assume payment of a mortgage for \$2,700." By deed dated the 8th of May, 1889, the lands were conveyed by the plaintiff to the defendant, "subject to two mortgages for the sums of \$2,000 and \$700 respectively, payment of which said party of the second part hereby assumes and from which he agrees to hold the said party of the first part harmless." This deed was not executed by the defendant. Subsequently the defendant sold to one Henderson, between whom and Kerr and Jenkins some negotiations, to which for the purposes of

Statement. this report it is not necessary to make further reference, took place as to extending the time for payment of the second mortgage.

Default having been made in payment of the mortgages, the executors of Kerr, who had in the meantime died, paid the claim of The Toronto Land and Investment Corporation under threat of action, and took an assignment of that mortgage to themselves. They called on the plaintiff to repay the amount to them, and the plaintiff, in turn, notified the defendant that he must pay. The defendant offered to pay the amount of the first mortgage if an assignment thereof were given to him, but Kerr's executors refused to give an assignment of the first mortgage, unless an assignment of the second mortgage were also taken.

This action was thereupon brought to compel the defendant to pay the first mortgage and to save the plaintiff harmless therefrom, and it came on for hearing on motion for judgment on the 24th of March, 1894, before BOYD, C., who, on the 27th of March, 1894, gave judgment, adding Kerr's executors as plaintiffs, and ordering the defendant to pay to them the amount due under the first mortgage.

The defendant appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, J.J.A., on the 12th of September, 1894.

E. D. Armour, Q.C., and *G. H. Kilmer*, for the appellant. The plaintiff, Thompson, has not paid the mortgage, and, therefore, cannot sue for indemnity. He is not the holder of the mortgage, and, therefore, cannot sue in respect of it. Kerr's executors cannot sue the defendant, for there is no privity between them. But if they can, the absurd result follows that they must assign the mortgage to the defendant, who can then turn round and sue them: *Alderson v. Elgey*, 26 Ch. D. 567; *Kinnaird v. Trollope*, 39 Ch. D. 636; R. S. O. ch. 122, secs. 2 and 3. Kerr's executors must have paid the loan company either in their

capacity of mortgagors or second mortgagees. If they paid as mortgagors, the debt was extinguished: *Teewan v. Smith*, 20 Ch. D. 724; *Otter v. Lord Vaux*, 2 K. & J. 650; affirmed, 6 D. M. & G. 638; *Jenkins v. Jones*, 6 Jur. N.S. at p. 395; *Box v. Bridgman*, 6 P. R. 234. If they paid as mortgagees, then the right of indemnity does not arise, and they must sue as mortgagees, and must give an assignment. [The effect of the negotiations with Henderson was also discussed.] Argument.

W. Mortimer Clark, Q.C., for the respondents. Thompson is clearly entitled to insist upon being indemnified by the defendant, and it is in the interests of the defendant to pay to Kerr's executors. The defendant, not being the owner of equity of redemption, is not entitled to an assignment: R. S. O. ch. 102, sec. 1, sub-sec. 4, and as against him Kerr's executors are entitled to consolidate: *Muttlebury v. Taylor*, 22 O. R. 312; *Watts v. Symes*, 1 D. M. & G. 240; *Selby v. Pomfret*, 3 D. F. & J. 595; *Johnston v. Reid*, 29 Gr. 293.

E. D. Armour, Q.C., in reply.

November 13th, 1894. BURTON, J.A. :—

This action, as originally framed, was by Thompson alone, who, at one time, owned the mortgaged premises, and had sold to the defendant, to compel him, under his covenant, to pay off the mortgage and indemnify him therefrom. The learned Chancellor ordered the executors of the late John Kerr to be added as plaintiffs, and gave judgment directly in their favour against the defendant. No amendment of the pleadings was made, and, as I do not see how the executors could maintain any action directly against defendant, I presume they were added merely to be bound by the judgment, if any such proceeding was required, and to enable the defendant to pay safely and directly to the parties beneficially entitled.

The executors were clearly entitled upon payment of the mortgage money to have an assignment of the mort-

Judgment.

BURTON,
J.A.

gage given to the Toronto Land and Investment Corporation.

In this case the property had been disposed of by the mortgagors, and had passed through several hands. Kerr, therefore, or his representatives, could not bring an action to redeem so long as the mortgagees abstained from suing, and if the mortgagees had elected to foreclose, they would not even have been necessary parties, but if the mortgagor is sued on his covenant, the case of *Palmer v. Hendrie*, 27 Beav. 349 ; 28 Beav. 341, shews that the mortgagor having paid what is due, is in some way or other entitled to require the mortgagee to perform the duty of reconveying the mortgaged property.

They have obtained a reconveyance in this case, and have a right to call upon their immediate vendee to indemnify them, and had he done so, he would in like manner have thereby acquired a right to redeem. They have not done so, but Thompson, who holds an indemnity against both mortgages, brings his suit to compel the defendant to fulfil his engagement.

He contends that the payment and reconveyance of the property operates as a discharge, and that the land is freed from the lien. To this, thus stated, I cannot accede, although the better and more formal plan to have pursued would have been to take a transfer to a nominee; but on the reconveyance the estate reverted subject to the equities of all parties then interested in the land, and being seized of the legal estate, the executors could not be compelled to part with it without repayment of the sums legally charged under the mortgage, which they had been compelled to pay.

I do not think it necessary to enter into any question as to the release of the defendant as to the \$700 under the dealings of the executors with Henderson, as it does not appear to be any part of the recovery in the present suit, and there appears to be another suit pending in respect of it, but assuming it to be still a validly existing claim, I do not think that the defendant is in a position to call upon the executors to convey to him.

Before the passing of our Act the law was thus laid down : " A mortgagee is not bound to assign the estate after payment to the mortgagor or his nominee if he have notice of an equitable claim by another person on the estate."

Judgment.
BURTON,
J.A.

The words of the statute are, " when a mortgagor is entitled to redeem."

Now, a second mortgagee is a mortgagor within the meaning of the Act, in that he is an assignee of the mortgagor or of some assignee of his, and is entitled to redeem. When, therefore, the first mortgagor paid off and took a reconveyance of the estate, if this second mortgage had been made to a third party, and the executors had notice of it, they would have become trustees of the legal estate for him. If so, they can be in no worse position, because they held the second mortgage. That mortgage is prior to the defendant's claim—in fact, he took the property subject to it, and is bound to pay it off unless released, as to which it is unnecessary to offer any opinion.

I am of opinion, therefore, that no ground has been made out for interfering with the judgment, and that the appeal should be dismissed.

OSLER, J.A. :—

I think that the judgment of the learned Chancellor should be affirmed. The defendant was bound by the covenant in his agreement with the plaintiff of the 10th April, 1889, to pay off both mortgages, amounting altogether to \$2,700, and he admits by the third paragraph of the statement of defence, that he became liable by virtue of the deed afterwards made to him in pursuance of such agreement (though not actually signed by him) to indemnify the plaintiff against loss by reason of such mortgages.

The plaintiff is now himself directly liable to Kerr's executors to satisfy them : as to the mortgage to the Toronto Land and Investment Corporation, because the amount of it formed part of the purchase money or consider-

Judgment.

OSLER,
J.A.

ation for the conveyance of the land to him by Kerr and Jenkins, which he was in some manner bound to pay, and which he assumed and undertook to pay by paying the mortgage and holding the vendors harmless against payment of it to the land company; and as to the second mortgage, which is his own, he is bound to pay it to Kerr's executors when due and called upon to do so. The defendant cannot say that because Kerr's executors have paid the land company the amount of the first mortgage in order to save themselves from being sued thereon, the mortgage is thereby paid and discharged, so that his obligation to the plaintiff in respect of it is satisfied. For the executors were not, as between themselves and the plaintiff, the persons liable to pay it, and they were therefore entitled to keep it alive by taking, as they did, an assignment of it. The plaintiff remains personally liable to pay them the amount they have paid to the first mortgagees. Thus the position is that the executors are holders of the first and also of the second mortgage, and the defendant who also acquired the equity of redemption from the plaintiff with notice of Kerr's rights, is liable to pay, as he expressly undertook to pay, both; and so to indemnify and save harmless the plaintiff, who is now, as I have said, directly liable to pay to them: See *Queen's College v. Claxton*, 25 O. R. 282, 290. On what principle can the defendant say, "I will only pay the first mortgage on receiving an assignment of the legal estate," which is now held for the benefit of and controlled by the second mortgagee? In what respect has he a better right to it? And how can he, for a moment, contend that the payment by him of the first mortgage would completely indemnify the plaintiff? The defendant's contention, as regards the real merits of this case, seems very much like that of a mortgagor who has given two mortgages, and is attempting to acquire the first as a protection against the second.

It was also contended by the defendant that the effect of the agreement made by the executors with Henderson, who purchased the equity of redemption from the defen-

dant subject to the foregoing, and a further mortgage, operated as an extension of the time for the payment of the second mortgage of \$700, and thus released the defendant from his liability thereon to the executors, he having become as between himself and the owner of the equity of redemption surety only for payment thereof; and so, it is said, the plaintiff being released, the defendant's obligation to indemnify him against payment is satisfied. I have seen, on further consideration, no reason to alter the opinion expressed on the argument that the instrument relied upon by the defendant is no more than an assumption by Henderson of a personal liability on the mortgage to the mortgagees, with an agreement to pay interest at the mortgage rate on the amount secured until it should be called in. The mortgagees' hands were not tied from proceeding upon it for an hour. The mistaken assumption that they were, is at the root of all the elaborate defences that have been raised in the action.

Judgment.

 OSLER,
J.A.

No difficulty arises from the fact that the executors were not, at first, parties to the action, or as to the mode in which relief has been given. The judgment shews that they were made parties by consent of the plaintiff and defendant, and the order that the defendant do indemnify the plaintiff by making payment direct to the mortgagees is a convenient and appropriate method of administering the relief to which the plaintiff is entitled: *Wooldridge v. Norris*, L. R. 6 Eq. 410; *Lacey v. Hill*, L. R. 18 Eq. 182.

MACLENNAN, J.A.:—

In his statement of defence, the defendant admits that by his purchase deed he became liable to indemnify the plaintiff against loss by reason of the mortgages in question, but I think the language of the deed goes farther than mere indemnity. The words are "payment of which said party of the second part hereby assumes, and from which he agrees to hold the parties of the first part harmless," and if the defendant had executed the deed, I think

Judgment. that would have been a covenant by him with the plain-
MACLENNAN, tiff actually to pay the mortgages. The defendant, how-
J.A. ever, did not execute the deed, and although an action of covenant would not lie against him, *Witham v. Vane*, 44 L. T. N. S. 718, yet *Burnett v. Lynch*, 5 B. & C. 589, shews, that having accepted the conveyance and dealt with the land, an action of assumpsit, or on the case, would lie against him on behalf of the plaintiff for the fulfilment of the terms on which the land was conveyed to him. The plaintiff, however, is not obliged to rely on the deed. If the defendant had executed it, it might well be held that the contract of sale was superseded by the provisions of the deed, and was exhausted, but the defendant, not having done so, the covenant in the articles which he executed is still in full force, and thereby he agreed to "assume payment" of the mortgages, which, I take it, means to "pay" them.

The defendant is, therefore, clearly liable to the plaintiff to pay these mortgages, unless discharged by reason of the deed poll executed by Henderson on the back of the \$700 mortgage, on the 11th March, 1892, while Kerr, the holder of it, was still alive, and after Henderson had become, and while he was, the owner of the mortgaged land. It is contended that after the sale to Henderson the defendant had become a mere surety, and that Henderson had become the principal debtor, and that by the arrangement of the deed poll the defendant was discharged. It is said that by that deed poll, time was given to the debtor, and that if not, the nature of his obligation was so changed as to release the surety from the \$700 mortgage.

The deed poll was made on the 11th of March, the day the \$700 mortgage became due, and it is in the form of a covenant by Henderson with Kerr in consideration of \$1, that he would pay the principal and interest of the mortgage money on demand; and that until demanded, it should run at six per cent., payable half-yearly, with the right, at any time, to pay it off. Now, I do not think this

instrument either gave time to the debtor or changed his obligation. The mortgage being due, the mortgagee could require payment at any time, and he still retained that right. The rate of interest remained the same as before, and although it was to run at six per cent., payable half-yearly, yet the mortgagee was not bound to wait. He could have sued for either principal or interest at any time after the agreement, with the same freedom and effect as if there had been no such agreement. The only effect of the deed poll appears to have been to give to the mortgagee a personal remedy against Henderson for the debt in addition to his remedy against the land, which he would not have had without it, for want of privity between them.

Judgment.

MACLENNAN,
J.A.

I, therefore, think that even if the case be regarded as one of suretyship, the defendant is not in any way relieved from liability to pay the \$700 mortgage.

The present action is confined to the \$2,000 mortgage, and the defendant does not dispute his liability to pay it, but he says that because he is no longer liable to pay the \$700 mortgage, he is entitled, upon paying the other, to an assignment of it from the executors of Kerr. No doubt but for the \$700 mortgage the defendant would be entitled to an assignment on paying the former off, but holding as I do, that he is still liable to pay the \$700 mortgage, he is clearly not so entitled without paying both. On paying both mortgages, he is entitled to an assignment of both mortgages, in order that he may protect himself by enforcing them against the property which is now owned by Henderson.

HAGARTY, C.J.O.:—

I agree.

Appeal dismissed with costs.

IN RE THE ONTARIO EXPRESS AND TRANSPORTATION
COMPANY.

*Company—Shares—Discount—Illegal Increase of Capital—Validating Act
—Winding-up.*

To attempt to make partially paid up shares in the capital stock of a company paid up shares by an allowance of a discount to the holders thereof is *prima facie* illegal, and a proviso in the Act of Incorporation “that no by-law for the allotment or sale of stock at any greater discount than what has been previously authorized at a general meeting” is not wide enough to impliedly authorize the allowance of such a discount on shares which were originally subscribed for at their full nominal value.

An Act of Parliament reciting that a company had been “duly organized,” had ceased its operations, and had been “reorganized”; and declaring that the charter is in force and the company “as now organized” capable of doing business, does not give legislative sanction to an illegal increase of the capital stock so as to make holders of shares of the illegally issued stock liable as contributories in winding-up proceedings.

Judgment of BOYD, C., 24 O. R. 216, reversed.

Statement. THESE were appeals by several alleged contributories from the judgment of BOYD, C., reported 24 O. R. 216, affirming the report of the Master in Ordinary, placing them upon the list in winding-up proceedings.

The company was incorporated by Letters Patent under “The Ontario Joint Stock Companies Letters’ Patent Act, 1874,” and its charter was confirmed and extended by Parliament by the special Act, 41 Vic. ch. 43 (D.). The following sections of this Act had a bearing on the matters in dispute:

Section 2. The capital stock of the company shall be \$100,000, divided into 1,000 shares of the value of \$100 each.

Section 12. The directors of the company shall have full power in all things to administer the affairs of the company, * * and may, from time to time, make by-laws not contrary to law to regulate the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the transfer of stock. * * Pro-

vided that no by-law for the allotment or sale of stock at any greater discount, or at a less premium than what has been previously authorized at a general meeting * * shall be valid or acted upon until the same has been confirmed at a general meeting. Statement.

Section 16. The whole of the capital stock of the company shall be subscribed, and twenty per cent. shall be paid thereon into some chartered bank in Canada in cash before the company shall proceed with its operations under this Act; and the rights, privileges and franchises conferred hereby shall be forfeited for non-user if the said stock be not fully subscribed and twenty per cent. paid thereon in cash prior to the 1st day of June, 1879.

Section 21. It shall and may be lawful for the said company by a majority of two-thirds of the votes of the stockholders present or represented by proxy, at a meeting to be specially called for the purpose, to increase the capital stock of the company as they may find or deem their business to require, to any amount not exceeding \$1,000,000. Provided always, that upon such increase of capital, there shall be, at the time of subscribing the same, at least ten per centum paid in, and such order made for the calling in of the remainder as the directors by by-law may direct; provided also, that it shall not be lawful for the company to increase its capital stock under the provisions of this section unless and until the capital stock fixed by the second section of this Act has been paid up in full.

Section 22. The powers and privileges hereby conferred shall be subject to the provisions of any general Act that may hereafter be passed by the Parliament of Canada; and all the provisions of the "Canada Joint Stock Companies Clauses Act, 1869," [32 & 33 Vic. ch. 12 (D.)] shall apply to the company, except so far as they may be inconsistent with this Act.

The original capital of \$100,000 was subscribed for and allotted soon after the passing of this Act, and twenty per cent. was paid up thereon before the 1st of January, 1879.

Statement.

The company went into operation for a short time, but discontinued business in 1879. At that time one Sutherland was president. Nothing was done till January, 1890, when Sutherland bought in all the shares not held by him, and then transferred a number to several of his friends. A special meeting of shareholders was then called and was held at Toronto on the 29th of January, 1891, when five persons were elected directors, one of them not being, in fact, a shareholder. The meeting was then adjourned till the next day at Montreal, and the proceedings were there confirmed. A meeting of directors was also held, and a by-law was passed by them enacting that "the holders of the original stock of the company shall be allowed a discount thereon of eighty per cent."

A resolution was also passed directing a special meeting to be called to consider the advisability of increasing the capital stock. Two meetings of shareholders were then on the same day held, at the first of which the directors' proceedings were confirmed, and at the second of which—the special meeting—a resolution was passed reciting that the original stock of the company had been paid up, and that, it being advisable to extend the business of the company, it was expedient to increase the capital, and then providing "that under the authority conveyed by the Act of Incorporation the capital stock of this company be increased to \$1,000,000 by a new issue of 9,000 shares of \$100 each."

The directors then met again, and allotted 1,000 shares to themselves, 1,000 to the officers and principal agents of the company, and 6,000 were directed to be allotted to holders of not less than ten shares subject to payment on subscription of ten per cent.

The subscriptions of the appellants for shares in the new issue were obtained in March and April, 1891, and the shares were duly allotted.

On the 30th of September, 1891, a special Act was passed in reference to the company, 54 & 55 Vic. ch. 110 (D.), of which the preamble is as follows:—

"Whereas by the Act of the Parliament of Canada, 41 Vic. ch. 43, the Ontario Express and Transportation Company was constituted a body politic and corporate, for the purposes in the said Act named; and whereas the said company was duly organized, the whole of the capital stock thereof being subscribed and twenty per cent. thereof paid thereon in cash, as required by section 16 of the said Act, and within the time in the said section specified; and whereas the said company carried on its business for several years before it ceased its operations; and whereas the said company has been reorganized, and desires to continue to carry on business on the terms and conditions in the said Act specified: Therefore," etc.

Section 1 provided that "the charter and Act of incorporation of the Ontario Express and Transportation Company * * is hereby declared to be in full force and effect, and the company as now organized is hereby declared capable of doing business." Section 2 preserved the rights of creditors of the company, "either as originally organized or as reorganized;" and section 4 gave any person "now owning or holding any share in the capital stock," power to surrender.

The appeals were argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 13th of September, 1894.

J. M. Clark, and *W. D. McPherson*, for the appellants. This company had no authority to issue shares at a discount and certainly, years after the subscription and allotment of the original stock, had no authority to declare a discount of eighty per cent. on the original stock. *Oregonian Gold Mining Co. of India v. Roper*, [1892, A. C. 125], is a direct authority on this point, and has been followed in *In re Eastern Times Publishing Co.* 63 L. J. Ch. 379. In two previous cases, *In re Phoenix Assurance Trust Co.*, 23 Ch. D. 542 and *In re Irish Home Insurance Co.*, 23 Ch. D. 545, the same question had been decided in favour of the company.

Argument. registered under the English Act shares might be issued in pursuance thereof at a discount; but these decisions were overruled in *In re Almada and Tirito Co*, 38 Ch. D. 415. The issue of this stock at a discount is also contrary to the doctrine of *Trevor v. Whitworth*, 12 App. Cas. 409. The same principle is recognized in our own Courts: *Page v. Austin*, 10 S. C. R. 132; *Scales v. Irwin*, 34 U. C. R. 545. See also, Buckley's Companies Acts, 6th ed., p. 560. Section 18 of 32 & 33 Vic. ch. 12 (D.), which applies to this company, requires a call of ten per cent. per annum till the whole of the capital stock is called in. Sections 33 and 34 provide for the limited liability of shareholders. Applying to these provisions the reasoning in the judgments in *Ooregum Gold Mining Co. of India v. Roper*, [1892] A. C. 125; and *Trevor v. Whitworth*, 12 App. Cas. 409, it is clear that the discount of eighty per cent. on the original stock was wholly unauthorized and illegal, and the appellants are not estopped from denying that they are shareholders or from disputing their liability: *Bank of Hindustan v. Allison*, L. R. 6 C. P. 54; *Page v. Austin*, 10 S. C. R. 132; and may repudiate their alleged shares after the winding-up order is made: *Smith's Case*, L. R. 4 Ch. 611; *Stace & Worth's Case*, L. R. 4 Ch. 682; Lindley's Law of Companies, 5th ed., pp. 759, 763, and 774. It is apparent from the Chancellor's judgment that he would have given effect to these contentions on the authority of *Page v. Austin*, 10 S. C. R. 132, but for the Act of 1891, 54 & 55 Vic. ch. 110 (D.); but this Act in no way validates the alleged issue of stock or in any way ratifies the increase of the capital stock. In the Act of 1891 there is not the slightest trace of knowledge or recognition by Parliament of the attempted increase of the capital stock of the company or of the allowance of the discount. The language of the Act indicates the contrary. The words "capital stock" in the preamble, obviously refer to the original capital stock of \$100,000. There is nothing in the Act to indicate that in any other part of the Act the words are used in any different mean-

Argument.

ing, and it is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament or other document. The Act recites that twenty per cent. of capital stock has been paid as required by section 16 of the Act of 1878. This is equivalent to a declaration that no more than twenty per cent. was paid on the original stock. The language of the Act of 1891 is inconsistent with any knowledge on the part of Parliament of the allowance of the discount and with any intention to validate the discount or the increase of the capital stock. Both the learned Master and the Chancellor base their judgments on the use of the words "organize" and "reorganize" in the Act of 1891. But these words will not bear the forced and strained construction placed upon them. The word "organize," as used in railway and other charters, ordinarily signifies the choice and qualification of officers for the transaction of business: Stephens on Joint Stock Companies, pp. 162, 163; *New Haven, etc., R. W. Co. v. Chapman*, 38 Conn. at p. 66; Morawetz on Private Corporations, 2nd ed., sec. 1,008. The "reorganization" of the company could not have referred to the irregular or illegal issue of increased capital stock because in the Act there is not any indication that there had been any increase of the capital stock.

Hoyles, Q.C., for the respondent, the liquidator. Such a discount as the present is clearly valid: *In re Plaskynaston Tube Co.*, 23 Ch. D. 542, and the cases referred to by the appellants are plainly distinguishable. In *In re Almada and Tirito Co.*, 38 Ch. D. 415, the discount was not authorized by the statute: See p. 418. In *Ooregum Gold Mining Co. of India v. Roper*, [1892] A. C. 125, both the charter of the company and the Act of Parliament were directly opposed to any discount, while here the right to allow a discount is expressly given. Moreover, these two cases and the others referred to by the appellants are cases of companies proceeding against shareholders. In the present case shareholders, who were on the books at the commencement of winding-up proceedings,

Argument. are seeking, as against creditors, to be relieved from liability in respect of the shares held by them. Where the rights of creditors have intervened, shareholders cannot easily escape liability: *In re Pioneers of Mashonaland Syndicate*, [1893] 1 Ch. 731. All that the creditors know is that these men agreed to take these shares, and after winding-up proceedings they cannot seek release from the contract they have entered into: *Challis's Case*, L. R. 6 Ch. 266; Lindley's *Law of Companies*, 5th ed., pp. 774, 776. But even if the discount be illegal, it is submitted that these new shares are not void. The rule is that if the shares can in any circumstances legally exist, then, however improper their issue may have been, the company and the holder of them may be estopped from denying their existence and the holding of them by him: Lindley's *Law of Companies*, 5th ed., p. 52. The distinction seems to be between cases where the increase is absolutely and wholly void, because under the law it was incapable of being made, and cases where there is a way in which the increase could lawfully be made and the abstract power did exist. In the former case creditors could not be misled; in the latter they could, and therefore the doctrine of estoppel applies: *Veeder v. Mudgett*, 95 N. Y. 295; Spelling on *Private Corporations*, secs. 804, 828; *Scovill v. Thayer*, 105 U. S. 143, at p. 149; *Chubb v. Upton*, 95 U. S. 665; *In re Miller's Dale Lime Co.*, 31 Ch. D. 211. The case of *Page v. Austin*, 10 S. C. R. 132, is distinguishable. It was not a case of winding-up, but was an attempt to fasten upon the defendant a liability which could only attach to a legal shareholder. This is clearly pointed out in that case in this Court, 7 A. R. at pp. 7 and 8; and in *In re Standard Fire Insurance Co.*, 12 A. R. 487. But at any rate the Act, 54 & 55 Vic. ch. 110 (D.) has cured all invalidities and irregularities in the constitution of the company. It is expressly a curative or remedial Act. The words "now organized" must mean as now existing, as now constituted, and this can only apply to the new company formed by the issue of the new stock. In the preamble the word "organize" is

used as equivalent to the "whole of the capital stock thereof being subscribed, and twenty per cent. thereof paid thereon in cash." The Legislature thus refers the term "organize" to the subscription for stock, and "reorganize" aptly refers to the new issue and the subscription therefor. The term cannot apply to any other fact in relation to this company. The company was then made up mainly of subscribers to the new issue of stock and it is this body as "reorganized" which is declared to be "capable of doing business." The Act evidently recognizes that this new stock might be questioned, because, by section 4, it gives the right to the then shareholders to surrender their shares and to withdraw from the company. Shareholders failing to avail themselves of this power must be held to have elected to take their chances and to have decided to remain on as constituent members of the company as then organized, and cannot now, in the liquidation proceedings, escape from the consequences of this deliberate election.

J. M. Clark, in reply.

November 13th, 1894. HAGARTY, C. J. O. :—

I am unable to view the Act of 1891 as doing more than enabling the company which had ceased its operations to be again set in motion for transaction of business, and lawfully to commence a legal existence.

The original charter is declared to be in full force, and nothing contained in the Act is to interfere with or prejudice the rights of any creditor of the company either as originally organized or as thereby reorganized.

Then, as was quite just as to a company which for years had ceased its work, and is again started on the original terms of its charter, shareholders are allowed on a month's notice to surrender their shares.

I do not think we can construe this statute as in any way interfering with the terms, conditions and restrictions of the original charter, and certainly as not, in the absence of express words, legalizing a violation of the ~~warranted~~ restriction as to the issue of new stock.

Judgment.

HAGARTY,
C.J.O.

The resuscitated company could have resumed business on the lines of its charter.

I think we cannot possibly imply from the Act of 1891 that so momentous an inroad on the stock-creating powers was intended to be sanctioned.

The alleged "paying up" of the old stock by the resolution declaring a discount of eighty per cent. to the shareholders can hardly be regarded as anything but a mere juggle to evade a clear statutable restriction.

In this view I think we must hold the new stockholders not liable on the ground that the stock subscribed for by them never had any legal existence.

We are bound by the law as declared in such cases as *Page v. Austin*, 10 S. C. R. 132.

I have always entertained the strongest opinion that where the rights and claims of creditors are involved no person taking shares can be heard seeking to escape liability on account of irregularities in the issue of the stock, or the neglect of some prescribed formalities, so long as the issue or creation of the stock was substantially lawful and authorized by charter.

Here the provision is that it shall not be lawful to increase the capital stock unless and until the whole \$100,000 of authorized stock has been paid up in full.

This provision was never in truth observed. By this attempted "juggle," the directors propose to satisfy the Act and affect to create ten times the original amount of stock.

It is a serious matter to allow shareholders in a company obtaining credit from the outside world, to resist liability on the ground of the stock held by them being illegally issued.

On the same ground, if the Act had allowed the issue of new stock, provided due notice had been given of the intention to issue the same in the "Official Gazette" for three months, and not otherwise, then, after the new shares had possibly passed from hand to hand many times, or dividends had been received thereon, the objection might be

urged that the issue was void and that no such stock had been created in consequence of the omission to advertise as directed.

Judgment.

HAGARTY,
C.J.O.

But I decide this case and allow the appeal on the law already laid down in such cases as *Page v. Austin*, 10 S. C. R. 132.

BURTON, J. A.:—

There is, I think, no doubt upon the authorities that the issue of new stock at the time it was issued, was not only illegal but was absolutely void. The simple question for decision is, what is the effect of the statute 54 & 55 Vic. ch. 110 (D.).

I am unable to construe that enactment as it has been construed in the Court below. It is a private Act introduced at the request of the parties concerned, and the language used should be treated as the language of the promoters; any doubt which arises as to the construction of that language is to be construed against the promoters, and the benefit of the doubt given to those who might be prejudiced by the exercise of the powers assumed to be granted.

I am unable, therefore, to assume that Parliament was aware of the new and illegal issue of stock, and that in effect a new company was created. On the contrary the preamble of the Act recites the fact that the company was organized with a capital stock of \$100,000, on which twenty per cent. only had been paid; that having ceased operations for several years, it had been reorganized and desired to continue to carry on business on the terms and conditions in the Act specified, and then the charter and Act incorporating the company are declared to be in full force and effect, and the company "as now organized" is declared capable of doing business. What would any one reading that Act of Parliament understand? That only twenty per cent. had been paid up; that doubts existed by reason of the charter having been disused for so long a

Judgment.
BURTON,
J.A.

period, and that to remove these doubts, an Act had been applied for.

No reference whatever is made to new stock. On the contrary, the promoters assert that eighty per cent. has not been called up, and Parliament would take notice that under such circumstances a new issue of stock could not legally be made.

It was contended that clause four applied to the new shareholders, and that not having availed themselves of the option to surrender their shares, they are too late.

I think it clear that that clause refers to the capital stock mentioned in the preamble ; the company was being galvanized into existence, and it was a most reasonable thing that Parliament should say the original shareholders should not, against their will, be involved in new transactions after so long an interval.

I do not believe that Parliament would knowingly have recognized and affirmed the issue of new stock if it had been made aware of its illegality ; but there ought to be a clear recognition in express terms, and here they appear to have been kept in ignorance of the facts in the manner I have mentioned.

There were no shares in existence in this case, and the appeals should, I think, be allowed.

OSLER, J. A. :—

The question is, whether the appellants have been rightly put upon the list of contributories in the course of the winding-up of this company under the Winding-up Act, R. S. C. ch. 129.

That depends upon whether they are really shareholders or members of the company. A contributory means a person liable to contribute to the assets of a company under the Act, sec. 2 (*f*) ; and by section 44, every shareholder or member of the company, or his representative, shall be liable to contribute the amount unpaid on his shares of the capital ; and the amount which he is liable to contribute shall be deemed an asset of the company, etc.

In *In re Standard Fire Ins. Co.*, 12 A. R. 487, where the Act of incorporation of the company provided that no subscription to stock should be legal or valid until ten per cent. should have been actually and *bonâ fide* paid thereon, this Court held that persons who had subscribed for stock, but had paid nothing thereon, could not be regarded as members or shareholders, and were not liable as contributories, and this although they were alleging their own non-payment of the ten per cent. as a ground for evading their liability.

Judgment.

OSLER,
J.A.

It may well be that in many instances a shareholder may have a defence to an action by the company for calls or may be entitled to maintain action against the company to be relieved from liability to pay calls on his shares, where he may, nevertheless, be held liable as a contributory in a winding-up proceeding. But I have failed to find a case in which, where a company has attempted to issue shares under circumstances in which their Act of incorporation absolutely prohibits them from doing so, the shareholder has been held disentitled to contest his liability, at all events where he has done no more than subscribe to the illegal issue and accept the illegal allotment.

What the appellants allege here is that although, as in *In re Standard Fire Ins. Co.*, 12 A. R. 487, they may be nominally shareholders they are not actually and really such because the shares they were induced to subscribe for were issued by the company in defiance of the express prohibition of the Act of incorporation, and are for that reason not legal or valid.

Two questions are presented for decision. 1st. Whether these new shares were in their inception legally issued; and 2nd, if not, whether the proceedings of the company in respect of them have been confirmed and the shares validated, and the liabilities of the holders thereof fixed by the Act passed 30th September, 1891, 54 & 55 Vic. ch. 110 (D.), "An Act respecting the Ontario Express and Transportation Company."

The first question appears to me to admit of but one

Judgment.

OSLER,
J.A.

answer. The original shares were subscribed and allotted as shares of the nominal cash value of \$100 each. That was the amount which each shareholder contracted to pay to the company upon each share, and the amount unpaid on each share when he so subscribed was \$100. Of this, twenty per cent. has been paid, we are not to enquire how; but the balance can only be so regarded by treating the allowance of the discount of eighty per cent. in the manner above mentioned as equivalent to payment. *Prima facie* such a transaction is utterly illegal. The language of Lord Halsbury in *Ooregum Gold Mining Co. of India v. Roper*, [1892] A. C. at p. 133, is quite pertinent to a case like the present: "The system by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares." See also p. 134: The agreement to take a share in a limited company "is an agreement to become liable to pay to the company the amount for which the share has been created. That agreement is one which the company itself has no authority to alter or qualify."

But the respondents point to section 12 of the Act of Incorporation, the last clause of which is a proviso "that no by-law for the allotment or sale of stock at any greater discount or at a less premium than what has been previously authorized at a general meeting * * shall be valid or acted upon until the same has been confirmed at a general meeting," and they contend that the discount by which the original shares were to become paid up shares, was substantially authorized by it. To this I do not agree. It seems to me to be a most unfortunate and ill-advised provision in any case. Whether it is sufficiently wide to authorize the original subscription for and issue of shares at a discount need not be considered. That, however, is the very utmost of the authority it confers. To hold that it authorizes the company to make a present to its shareholders of any part of the amount they

have contracted to pay when they have subscribed for shares of the full nominal value would be to give the language of the proviso a construction of which it is not fairly capable, and to give the words a meaning they were never intended to bear. The original capital stock of the company was, in my opinion, never paid up in full, and the new issue was *ultra vires*, not merely the directors, but the company, and therefore, unless the Act of 1891 has fixed the appellants with liability for the shares subscribed by them in that issue, I think they are not legally shareholders or liable to be placed on the list of contributories. Their case appears to me to be a stronger and more meritorious one than that of the alleged shareholders in *In re Standard Fire Ins. Co.*, 12 A. R. 487. The issue of the shares was not merely irregular. It can only be described as illegal and the subscribers never were really shareholders: *In re Almada and Tirito Co.*, 38 Ch. D. 415; *Trevor v. Whitworth*, 12 App. Cas. 409; *Page v. Austin*, 10 S. C. R. 132; *Scales v. Irwin*, 34 U. C. R. 545.

Coming now to the Act of 1891:—

It is expressed in extremely vague and general language; the operative words are found in the first section which declares that the charter and Act of incorporation of the company are in full force and effect, and that the company as now organized is “capable of doing business.” What meaning is to be attributed to the expression “as now organized”? The respondent urges that it covers the illegal issue of shares—the company as now organized with a capital of a million dollars. I find, I confess, much difficulty in accepting this view. The word “organize,” as has been pointed out, is not a word of art, and has no technical meaning, and there is nothing in the Act to indicate that the company had attempted to increase their capital by an illegal issue of shares, or that Parliament meant to make valid a transaction of that kind. The preamble is the key which unlocks in this case the meaning of the Act, reciting as it does, first, the organization of the company by the subscription of the capital stock mentioned in the Act of

Judgment.

OSLER,
J.A.

Judgment.

OSLER,
J.A.

incorporation, and payment of twenty per cent. thereon; second, the carrying on business by the company for several years "before it ceased its operations"; third, that it has been reorganized; and, fourth, desires to continue to do business on the terms and conditions in the original Act specified.

The status of the company is the subscription of the capital stock and payment of the twenty per cent. thereon, which is directly opposed to the idea of a reorganization with or by means of an increase of capital. The company say to Parliament, that is our position. We ceased our operations many years ago, and we have now reorganized and want to go on again on the terms and conditions mentioned in our charter.

The words "reorganized" in the preamble, and "as now organized," in section 1, appear to me to be used in reference to the company having "ceased its operations," and to imply nothing more than that it has been set on foot again by the election of directors and officers. This satisfies the saving clause of the 4th section, which may well be read as applying to the shareholders of the capital stock mentioned in the preamble, who have, as it recites, paid up twenty per cent. upon their shares, and upon whom, by this section, the privilege is conferred of withdrawing from the company by giving written notice of their intention to do so within one month after the first call made subsequent to the passing of the Act. We are dealing with the language of the company, in the private Act which they procured from Parliament. What they asked, and what is conferred upon them, is, that as then organized, they should be capable of doing business, and the whole object of the Act, as it appears to me, is to make it clear that the non-user of their corporate power for ten or eleven years shall not affect their right to carry on business on the terms and conditions in the original Act specified. I do not think we can assume that Parliament knew more than the company chose to tell it, and it seems to me that they carefully refrained from telling it

that they had undertaken to increase the capital, or to treat the old stock as paid up by the allowance of a discount.

Judgment.

OSLER,
J.A.

MACLENNAN, J. A. :—

I am of the same opinion. Section 21 of the original Act of incorporation, in the strongest terms, makes the full payment of the authorized capital a condition precedent to its increase. Unless, therefore, the original capital was paid up in full when the stock in question was issued, it was null and void, and the appellants never were shareholders at all.

The only authority for allowing a discount on the original capital is section 12.

This section, no doubt, if not expressly, at all events by implication, authorizes the allotment or sale of stock at a discount, but what was done here was neither an allotment nor a sale. The shares referred to had been allotted or sold long before at par, and not at a discount; and the several shareholders were liable to pay the whole of the amount still remaining unpaid whenever called upon so to do; and the by-law in question was in effect an extinguishment without any value or consideration of eighty per cent. of the company's capital. It is true that the shares themselves were not intended to be wiped out, but that can make no difference. The capital of a company is not the abstract thing called stock or shares, but the money which comes to the company in respect of the stock or shares. The money is the substantial thing, and if the right to the money is extinguished, that is in reality and in substance wiping out so much of the company's capital, which a company has in general no right to do. We had occasion to consider the authorities on this subject very fully in *Livingstone v. Temperance Colonization Society*, 17 A. R. 379; and I think it is clear that the by-law allowing the discount on the original shares was wholly void.

Judgment. It follows, therefore, that unless the new Act obtained
MAOLENNAN, by the company has validated the stock assumed to be
J.A. issued under the circumstances above stated, that stock is
void, and the appellants cannot be regarded as share-
holders.

The Act was passed on the 30th of September, 1891, and the argument of the respondent is mainly founded on its preamble and on the 1st section. It is contended that these enactments have the effect of legalizing the new issue of stock, because that issue must be taken to be an essential part of the new organization of the company.

With great respect I am unable to feel the force of the learned Chancellor's reasoning upon the effect of the statute. It did not require the new stock to give new life to the company. The old stock was sufficient for that purpose. The new Act declares the old charter and Act to be in full force and effect; and to enable it to do business all that was required was the election of a board, and the appointment of the several executive officers. No business had been done for many years. It was doubtful whether the company was not wholly effete or defunct. It could hardly be said that there was any lawful board of directors, or any executive officers still in existence. But the shareholders had met and elected a new board, and new officers had been appointed. I think that election and appointment was the reorganization meant by the statute. It may not be easy to see the meaning of the Legislature in the use of the words "originally organized" and "reorganized" in section 2, but if the words be held to mean all that was needed to enable them to do business, namely, the subscription for and allotment of stock and the payment of ten per cent. thereon, I am unable to see that it follows that the Legislature meant to sanction an illegal gift of eighty per cent. of the old capital of the company to the promoters of the Act, and the issue of new capital to the public, who would be led thereby to suppose that the old capital had been paid in full. If Parliament had meant to sanction and legalize these acts, I think it would have done

so expressly, and would not have left their intention in such an important matter to be left to mere inference. Judgment.
MACLENNAN,
J.A.

I think the new stock must be held to have been issued without any corporate power or authority, and that the appellants never were shareholders in law or in fact, and cannot be made accountable as contributories in the winding-up.

The appeals should, therefore, be allowed.

Appeals allowed with costs.

HORSFALL V. BOISSEAU.

*Bills of Sale and Chattel Mortgages—Description—After Acquired Goods—
R. S. O. ch. 125, sec. 27—55 Vic. ch. 26, sec. 1 (O.).*

A description in a chattel mortgage of after acquired goods as “all other ready-made clothing, tweeds, trimmings, gents’ furnishings, furniture and fixtures and personal property, which shall at any time during the currency of this mortgage be brought in or upon the said premises or in or upon any other premises in which the said mortgagor may be carrying on business,” is sufficient and binds goods of the kinds mentioned in premises to which the mortgagor moves after making the mortgage, and the amending Act 55 Vic. ch. 26 (O.) has not made any difference in this respect.

Judgment of MACMAHON, J., affirmed.

THIS was an appeal by the plaintiffs from the judgment of MACMAHON, J., in an interpleader issue between the plaintiffs, as execution creditors of one Giles, and the defendant, as claimant under a chattel mortgage made by Giles. Statement.

The chattel mortgage was given on the 6th of February, 1893, to secure advances in goods and money, and the only question was as to the sufficiency of the description as far as after acquired goods were concerned. The description was as follows:—

“Now this indenture witnesseth that in consideration of the premises the said mortgagor hath granted, bargained, sold, and assigned, and by these presents doth

Statement. grant, bargain, sell, and assign unto the said mortgagee, his heirs and assigns, all and singular all the goods, chattels, fixtures, stock-in-trade, and personal property of the said mortgagor, in the city of Hamilton aforesaid, and situate in that certain store and premises lying and being in the said city of Hamilton, and being composed of the store known as 'city number 5' on the Market Square in the said city of Hamilton, and consisting of all the stock of ready-made clothing, tweeds, trimmings, gents' furnishings, furniture and fixtures, together with all other goods, chattels and personal property now in and upon the said premises, and together with all other ready-made clothing, tweeds, trimmings, gents' furnishings, furniture and fixtures and personal property which shall at any time during the currency of this mortgage be brought in or upon the said premises, or in or upon any other premises in which the said mortgagor may be carrying on business, all of which said goods, chattels and personal property are the property of the said mortgagor, and are situate in and upon the premises hereinbefore described in the said city of Hamilton."

At the time the mortgage was given Giles had but one store, described in the mortgage, but about the 1st of June, 1893, he opened another store on James street, in the city of Hamilton, carrying on the same class of business in each. Nearly all the goods in the James street store were new purchases. On the 11th of August, 1893, the chattel mortgagee seized both stocks, and was in possession when the sheriff, on the 17th of August, 1893, seized under the plaintiffs' executions.

The issue was tried at Hamilton, on the 16th of January, 1894, before MACMAHON, J., who, on the 21st of March, 1894, gave judgment in the claimant's favour; and an appeal from that judgment was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 20th of September, 1894.

Gibbons, Q.C., for the appellants. This description is bad. The recent Act, 55 Vic. ch. 26 (O.), has been overlooked. By that Act the requirements of the Bills of Sale Act, R. S. O. ch. 125, as to description of existent chattels, are extended to non-existent chattels. Clearly the general description here would be bad as to existent chattels, and it is, therefore, bad as to after acquired chattels. A general description will be upheld if the locality is properly defined, but there is here no attempt to define the locality, and the description in effect says, "all the goods to be hereafter owned by the mortgagor." Taking possession by the mortgagee does not aid him: 55 Vic. ch. 26, sec. 4 (O.). That section cannot be limited to execution creditors, for possession never availed after execution had issued. *Meriden Britannia Co. v. Braden*, 21 A. R. 352, may be cited against me, but it is easily distinguishable, for there the goods had been sold before the creditors took proceedings. In this case they were seized in the mortgagee's hands.

Argument.

George Kappelé, for the respondent. The description of goods to be acquired is sufficiently definite, limited, as it is, to a particular business. It would be impossible to mention all the localities in which the business might be carried on, and such an unreasonable construction should not be given to the new Act, even if it applies at all. It is submitted that it does not apply. Section 4 of the Bills of Sale Act, R. S. O. ch. 125, has nothing to do with questions of description. By the new Act new classes of persons are allowed to take advantage of section 4, but the extension must be limited to the subjects dealt with by section 4, and therefore taking possession is still sufficient to cure any defect in description.

Gibbons, Q.C., in reply.

November 13th, 1894. HAGARTY, C.J.O.:—

Before the passing of the Act of 1892, there does not appear to have been any statutable provision respecting future goods brought into a stock in trade on which a chattel mortgage was given.

Judgment.

HAGARTY,
C.J.O.

This Court, in the case of *Coyne v. Lee*, 14 A. R. 503, upheld a mortgage which included future goods brought into a stock then on the then premises of the mortgagor.

The Court, after reviewing the English cases, down from *Holroyd v. Marshall*, 10 H. L. C. 191, held that the equitable right of the mortgagee to such future goods when brought into stock prevailed against execution creditors. The mortgage had been duly registered. It was considered that if registration was required, it had been duly effected; if not required, then there was nothing else to defeat the equitable right.

Apart from the point as to a removal into other premises, to be noticed hereinafter, and as to the Act of 1892, the case would apparently fall within *Coyne v. Lee*, 14 A. R. 503.

In the Act of 1892, 55 Vic. ch. 26 (O.) section 2 declares that the provisions of R. S. O. ch. 125 shall extend to mortgages of goods and chattels notwithstanding such goods may not be then the property of, or in the possession or control of, the mortgagor, or any one on his behalf, and notwithstanding that such goods may be intended to be delivered at some future time, or that the same may not be, when the mortgage was made, actually procured or provided, or fit or ready for delivery, and notwithstanding that some act may be required for making or completing such goods and chattels or rendering the same fit for delivery.

This language seems to include all goods not in the possession or control of the mortgagor, not intended to be delivered till some future time, not actually procured or bargained for, not fit or ready for delivery, and in fact not made or completed.

It is not easy to understand how the future goods to be at any time brought into the mortgagor's premises do not fall within the words of the new Act.

Then if they fall within the provisions of chapter 125, how and what provisions are or can be applied to them.

It seems to me that it is only on the provision as to identification that any question arises.

Section 27: "All the instruments mentioned in this Act, whether for the sale or mortgage of goods and chattels, shall contain such sufficient and full description thereof, that the same may be thereby readily and easily known and distinguished.

Judgment
HAGAN, J.
O.J.C.

It was conceded on the argument that all the appellants' objections rested on the clause as to future goods being "brought in or upon any other premises in which the said mortgagor may be carrying on business."

There is no restriction as to any other premises in any part of the city of Hamilton or the county of Wentworth, or in fact any part of Ontario.

Assuming that a long line of cases in our Courts has established that it is a sufficient description of chattels to describe them as being the stock in trade, etc., in a certain warehouse or shop of the mortgagor, being No. —, in — street in the city of —, we have to consider as to future goods; the mortgage will cover all goods to be afterwards put in stock in the named locality.

I find a great difficulty in distinguishing to my own satisfaction, between the then locality and a future unnamed locality where the mortgagor during the continuance of the mortgage may be carrying on business.

I have found no case in which such a point arose under the former law.

No doubt but that a man may mortgage present or future goods in two or more places of business. At the date of the mortgage he had only the Market Square place. He might afterwards establish a second place of business in Hamilton or elsewhere.

But I think that the mortgage here covered all new goods brought into any other premises where the mortgagee carried on business and the mortgagee could if necessary be compelled to execute any writing or to say as to what such new goods were just as suggested by Lord Mansfield in *Shirley v. Mitchell* (1751) 1 Wm. Bl. 291, on a contract to sell some property sufficiently specified as

Judgment.
BURTON,
J.A.

Long before *Holroyd v. Marshall*, 10 H. L. C. 191, was determined it was well settled that an assignment of future property for value operated in equity by way of agreement binding the conscience of the assignor, and so binding the property from the moment when the contract became capable of being performed, on the principle that equity considers as done that which ought to be done.

A question somewhat similar to that we are called upon to decide arose in *Tailby v. Official Receiver*, 13 App. Cas. 523, on the construction of an assignment of after acquired property, there consisting of book debts, and the bill of sale assigned all the book debts due and owing, or which might, during the continuance of the security, become due and owing to the mortgagor, not being limited to the debt of any particular business.

The Court of Appeal held that the assignment, not being limited to book debts to arise in any particular business, was invalid on the ground that the subject matter was not sufficiently defined, and, therefore, that it did not operate to pass the property in a book debt which came into existence after the assignment, but the House of Lords reversed that decision, and Lord Herschell, in the course of his judgment, says (p. 530): "I confess I am unable to see any sound distinction between an instrument assigning future book debts which may become due to the assignor in any business carried on by him, and one assigning future bequests and devises to which he may under any will become entitled" and Lord Watson says (p. 533): "There is but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is, that, on its coming into existence, it shall answer the description in the assignment, or in other words, that it shall be capable of being identified as the thing, or as one of the very things assigned. Where there is no uncertainty as to its identification the beneficial interest will immediately vest in the assignee."

The case of *In re Clarke, Coombe v. Carter*, 36 Ch. D. 348, is to the same effect, and was approved of by the House

of Lords, and I quote a few words of Lord Justice Bowen on the point of the supposed vagueness in this description (p. 355): "A contract may," he says, "be so vague in its terms that it cannot be understood, and in that case it is of no effect at law or in equity. There is another kind of vagueness which arises from the property not being ascertained at the date of the contract, but if at the time when the contract is sought to be enforced the property has come *in esse* and is capable of being identified as that to which the contract refers, I cannot see why there is in it any such vagueness as to prevent a Court of Equity from enforcing the contract."

Judgment.

BURTON,
J.A.

I refer to these cases as shewing that the generality of the description, provided the subject matter can be identified when it comes into existence, is no objection to the validity of the assignment or its specific performance, and it has this bearing, that if such a contract as I have referred to is sufficiently certain to warrant a Court of Equity in enforcing specific performance, it seems difficult to suggest a reason why the description given of the same property in a chattel mortgage does not come within the words of the Act as such a full and sufficient description so that the same may be thereby readily known and distinguished.

One of the modes adopted in referring to property existing at the time of the mortgage, especially where it consists of a stock of goods, is to describe it as a stock of goods in the store of the mortgagor on a certain street; but though this has been generally adopted as a usual and safe description, I do not at all concede that a transfer of "all my stock in trade" would not be sufficient. In both cases resort would necessarily be made to extrinsic evidence to shew that the stock in trade purporting to be transferred was owned or possessed by the mortgagor, or on the described premises at the time of the execution of the mortgage.

The mortgage itself would be no evidence that, six months after its execution, a stock of goods on the

Judgment.

EURTON,
J.A.

premises described in the mortgage were mortgaged goods. The sheriff would have a right to be satisfied that they were there when the mortgage was given, and he must seek for that evidence outside the mortgage.

I, a trader, carrying on business, and having only one place of business, convey all my stock in trade; can any one advance any valid reason why that which is admittedly good as a conveyance is not equally good as a registered conveyance? The property can be as easily and readily ascertained as if I had added "in my store on the south side of King street in the city of Toronto," or had even added "in the county of York, and Province of Ontario"; it might be different if I were carrying on business at several places.

I trust I may not be thought arrogant if I venture to say that some of the earlier decisions on this statute do not commend themselves either to one's sense of justice or of sound interpretation, and tended to destroy the confidence of the commercial community in a law passed for the purpose of facilitating transactions between debtor and creditor, and for preventing secret as well as fraudulent transfers. To read some of these judgments, it would seem as if chattel mortgages were criminal transactions, and that every intendment should be made against them and in favour of the execution creditor, whereas the holder of such a security, who had advanced his money on a specific security, should, in the ordinary course, have been regarded as a purchaser for value and entitled to a more favourable consideration than a creditor who had not advanced his moneys, relying upon any specific security, but who was enabled by the construction adopted to pay his debt from a stranger's goods.

Even in more recent cases, a description was held bad where the goods were described as the stock in trade, goods and chattels, which the mortgagors had in their store and dwelling in the village of Renfrew, because the street and number of the house were not mentioned.

Some Judges have gone the length of holding that the mortgage alone could be looked at without resort to extrinsic evidence of any kind, whereas the late Sir John

Robinson adopted the more reasonable rule that the Court could not hold that what was exacted was that a person should be able to find in the deed all that was required for enabling him to distinguish the chattels mentioned in it by merely casting his eye upon the chattels, and he held that all that was required was that the description should be such as might, by the aid of the deed and extrinsic evidence, shew what was intended to pass.

Judgment.

**BURTON,
J.A.**

The Court had some difficulty in deciding whether "all his blacksmith's tools" passed, and with some hesitation held that they did not; but if the trade of a blacksmith had been the mortgagor's business, I apprehend there would have been no difficulty in holding that they passed. The learned counsel for the appellant concedes that if the goods had been brought upon the Market Square premises they would have passed. But this concession, I think, puts him out of court. In describing the then existing goods, the addition of the Market Square is proper and prudent as defining their locality, but merely as a means of identification. In order to identify the after purchased goods, it would, if disputed, be necessary to shew the purchase, and that they had been delivered to the mortgagor, and if the description in the contract between him and the mortgagee sufficiently identifies the property, then it would immediately attach and vest the beneficial interest in the mortgagee. The goods in question were delivered at the James street store, and, being there, are by the mortgage itself identified as the property which the mortgagor contracted should be delivered there, and I think that the beneficial interest vested, and that the terms of the new Act have been sufficiently complied with.

I think that the appeal should be dismissed.

OSLER, J. A. :—

The claim to the goods which had been brought into the James street store from the Market Square store, was not pressed. These goods were undoubtedly covered by the mortgage; no fault could be found with the descrip-

Judgment.

OSLER,
J.A.

tion, and the plaintiff could not lose his right to them by their removal. Then were the other goods in the James street store well described? The answer to this depends upon whether they were fairly capable of being ascertained and made definite by a reasonable and intelligent application of the words, "all other goods which shall at any time during the currency of this mortgage, be brought in or upon any other premises in which the mortgagor may be carrying on business."

As regards such goods and goods of a similar character, which might be thus brought into the Market Square store, the instrument taken as a whole is equivalent merely to a covenant to assign the future acquired property to be held, when it comes into existence, upon the terms and for the purposes therein expressed. Such a covenant never was, in my opinion, within the scope of the Chattel Mortgage and Bills of Sale Act, which professes to deal only with the sale or mortgage of specific existing goods capable of immediate delivery and of actual and continued change of possession. To such transactions only are the 1st and 5th sections of the Act applicable. There is not a word in the Act which contemplates the assignment of goods not in existence, or not belonging to the grantor at the time of the assignment: *Tailby v. Official Receiver*, 13 App. Cas. 523, and *Brantom v. Griffiths*, 1 C. P. D. 349; 2 C. P. D. 212. Such an assignment was at common law inoperative in the absence of some *novus actus interveniens* on the part of the grantor after he had acquired the property in the goods: *Lunn v. Thorntcn*, 1 C. B. 379; but it has long been settled that such property is assignable in equity for value. "The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified":

Tailby v. Official Receiver, 13 App. Cas. at p. 543; and *per* Lord Watson in the same case, p. 533: "There is but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is, that, on its coming into existence, it shall answer the description in the assignment or, in other words, that it shall be capable of being identified as the thing or as one of the very things assigned. When there is no uncertainty as to its identification, the beneficial interest will immediately vest in the assignee." To the same effect is the judgment of Bowen, L. J., in *In re Clarke, Combe v. Carter*, 36 Ch. D. 348. "A contract may be so vague in its terms that it cannot be understood, and in that case it is of no effect at law or in equity. There is another kind of vagueness which arises from the property not being ascertained at the date of the contract, but if at the time when the contract is sought to be enforced the property has come *in esse* and is capable of being identified as that to which the contract refers, I cannot see why there is in it any such vagueness as to prevent a Court of Equity from enforcing the contract."

Judgment.

OSLER,
J. A.

The question was very fully examined in *Tailby's* case. It arose upon an assignment of future choses in action thus expressed: "All the book debts due and owing, or which may during the continuance of this security become due and owing to the said mortgagor." This was held to be effectual to bind a book debt which arose and became due to the mortgagor nearly five years afterwards. The present case relates to future acquired chattels, and in my opinion they are within the mortgage as easily identifiable as was the book debt in the case cited. To apply Lord Herschell's language: "The subjects of both assignments are equally wide, equally incapable of ascertainment at the time of the assignment, but equally capable of identification when the subject has come into existence, and it is sought to enforce the security."

The assignment is not open to the objection sometimes suggested in similar cases that it covers all the future property of the mortgagor wherever acquired or wherever situate. It is confined to property to be acquired during

Judgment.

OSLER,
J.A.

the continuance of the security, and on premises on which the mortgagor may be carrying on business. Within these limits the goods intended to be charged or assigned are made sufficiently certain and definite on their coming into existence and answering the conditions of the description. The cases already referred to appear to me to be clear authority for so holding. I refer also to *Thomas v. Kelly*, 13 App. Cas. 506; and *McAllister v. Forsyth*, 12 S. C. R. 1. The case of *Coyne v. Lee*, 14 A. R. 503, may also be noticed, where the general question of an assignment of future property was to some extent discussed.

Then, how far is the mortgage affected by the recent Act? That it comes within it can hardly be denied, and it has been registered, and so far, has complied with the requirements of the General Act. The Act does not purport to control the right or power of any one to charge or covenant to convey or assign future acquired chattels. At most, it requires that any instrument purporting to do so, must comply, so far as it is possible in the nature of things, with the provisions of the General Act. To hold that such chattels, in order to be the subject of a valid agreement, must be such only as if not by anticipation specifically described, *e.g.*, all the white or black horses, or all the mahogany tables I may hereafter acquire, must, at least, be such as may be found in some then defined locality, would be to limit the power to charge or assign them in a manner not warranted by the Act. We ought not to seek to impose upon the parties the necessity for a better, or fuller, or more definite description than will suffice to ascertain and identify the goods when they come into existence, and it is to this extent only that the provisions of section 27 of the General Act are practically applicable. I think the mortgage in question is sufficient in this respect, and am, therefore, of opinion that we should dismiss the appeal.

MACLENNAN, J.A. :—

I agree with my brother BURTON.

Appeal dismissed with costs.

IN RE TOWNSHIP OF HARWICH AND TOWNSHIP OF
RALEIGH.

Drainage—Municipal Corporations—55 Vic. ch. 42, sec. 590 (O.).

Held, per HAGARTY, C.J.O., and BURTON, J.A.:—Where a drain constructed or improved by one municipality affords an outlet, either immediately or by means of another drain or natural watercourse, for waters flowing from lands in another municipality, the municipality that has constructed or improved the outlet can, under section 590 of the Consolidated Municipal Act of 1892, 55 Vic. ch. 42 (O.), assess the lands in the adjoining municipality for a proper share of the cost of construction or improvement, and the Drainage Referee has jurisdiction to decide all questions relating to the assessment.

Per OSLER, and MACLENNAN, JJ.A.:—The section applies only to drains properly so called, and does not extend to or include original water-courses which have been artificially deepened or enlarged, and *In re Orford and Howard*, 18 A. R. 496, still governs.

The Court being divided in opinion, the judgment of the Drainage Referee upholding the right to assess was affirmed.

THIS was an appeal by the township of Harwich from the report of B. M. Britton, Q. C., Referee under the Drainage Trials Act, 1891, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 9th of May, 1894. Statement.

The township of Raleigh enlarged and improved a drain in that township, and assessed lands situate in the township of Harwich for part of the cost, on the ground that the Harwich lands used the Raleigh drain for outlet purposes. Very much the same state of facts existed as in *In re Orford and Howard*, 18 A. R. 496, and the point in question in this appeal was whether the amendment made by 55 Vic. ch. 42, sec. 590 (O.), gave power to do what had been done. The Referee held that it did give this power.

M. Wilson, Q. C., for the appellants.

C. R. Atkinson, Q. C., for the respondents.

November 13th, 1894. HAGARTY, C. J. O. :—

Two main questions are raised in this dispute. First, on the law, as to the legal liability of the appellant township to be assessed for outlet.

Judgment.

HAGARTY,
C.J.O.

The case *In re Orford and Howard*, 18 A. R. 496, in this Court, was decided under section 590 and other sections of the Municipal Act, R. S. O. ch. 184.

The work here in question was constructed under the Municipal Act of 1892, and the authorizing section is altered and extended from that which governed the *Orford* case, making the direction more clear and explicit. I also refer to the amendment made to section 585 by the same numbered section in the Act of 1892.

Section 590 applies where a drain already constructed, or to be constructed, is used as an outlet or will provide an outlet for the water from the lands of another municipality or of a company, etc., or if from such lands water is by any means caused to flow upon and injure the lands of another municipality, etc., then the lands that use or will use such drain as an outlet either mediately or immediately or by means of another drain from which water is caused to flow upon and injure lands may be assessed in such proportion and amount as ascertained by the engineer, surveyor, etc., etc., under the formalities (except the petition) provided by the sections for the construction and maintenance of such drain or drains as may be necessary for conveying from such lands the waters so caused to flow upon and injure the same.

I think the evidence in this case brings the right of Raleigh to assess the Harwich lands for an outlet beyond reasonable question.

It is for an outlet and not for benefit that the right is claimed. The Legislature has, I think, given the right.

If the right exist, we have to consider the award.

I have examined the very full and careful reasons adduced by the learned Referee, not satisfying myself with only one perusal.

I am unable to see that any error has been committed to warrant our interference.

He finds that Harwich had made many drains, and by them "caused more water to flow upon Raleigh than would naturally have flowed there, and they brought

water more rapidly upon Raleigh than it would naturally have come ;” and again he finds that he cannot agree that Harwich or Tilbury East are brought to a natural water-course, which is of itself sufficient outlet for these townships within the meaning of the law.

Judgment.

HAGARTY,
C.J.O.

This is said in reference to the law of the *Orford* case. After full discussion of the arguments, he says: “I have come to the conclusion that if the amendments to sections 585 and 590 have any meaning, they must apply to such a work as is now proposed by Raleigh.”

He adds: “I have come to the conclusion that section 590 does now authorize an assessment for outlet upon lands that discharge their water through drains, whether these drains are wholly artificial, or have been made in the bed of some natural watercourse, or run, or so-called creek, and where the water coming from these lands to be assessed, flows upon and injures the lower lands, and would continue to do so if an outlet had not been made or improved.”

The learned Referee has discussed and disposed of all the objections and arguments on behalf of Harwich, and on the whole, I do not see how we can differ from his conclusions.

I have examined the evidence of the acting surveyor, McGeorge, and also of Augustine McDonald.

Their evidence strongly supports the result. They are both old and experienced surveyors.

Objection was taken to the placing of a uniform assessment on a large number of lots.

The engineer expresses his view that this assessment was the most fair and just method of proceeding. This must be a question of judgment resting with the surveyor, and I do not see how we can hold it to be incorrect upon the evidence adduced.

I think the appeal must be dismissed.

We may regret the enormous bulk of the appeal, and the utterly useless printing of countless pages of figures and other wholly useless matter. This, it is to be hoped, will be duly considered on taxation.

Judgment. BURTON, J. A. :—

BURTON,
J.A.

This case came before the Referee as an appeal in substitution presumably of the former reference to arbitration under the Drainage Acts, and his right to deal with it as an appeal must depend, I fancy, on whether the subject matter was one with which the arbitrators could formerly have dealt, unless we can find in the amendments to the Municipal Act or in the Drainage Trials Act a distinct authority for such an appeal.

The report appealed from was that of the engineer appointed by the township of Raleigh to report on the proposed work, a work to be performed wholly within that township with a short extension simply for outlet through a portion of Tilbury.

As I understand the report it does not profess to assess any lands for benefit in Harwich so as to bring the case within section 576, but for outlet simply under the provisions of sections 585 and 590. But I gather from the papers that a copy of the report was served as required by section 579 on the head of the township of Harwich.

Under the Consolidated Act of 1883, when the work was confined to one township, before any work could be proceeded with, surveys and estimates had to be made by an engineer, and an assessment on the real property to be benefited, after which the council could pass a by-law for, *inter alia*, assessing and levying in the same manner as other taxes are levied on the property benefited (including roads held by joint stock companies or individuals) according to the benefit derived, and for determining what real property would be benefited, subject to an appeal to the Court of Revision and County Judge.

That Act also provided for extending the work beyond the limits of the municipality, and even where they did not extend beyond these limits, when they benefited lands in an adjoining municipality or greatly improved any road lying within that municipality, then the engineer could charge the lands so benefited, and the corporation,

person or company whose roads were improved, with such proportion of the costs of the works as he might deem just.

Judgment.

BURTON,
J.A.

In the two latter cases the council in which the drainage is commenced is to serve the head of the other council or councils with a copy of the report, etc., which is to be binding unless appealed from.

The council of such last mentioned municipality is thereupon within a named period to pass a by-law to raise the sum named in the report, or such sum as is determined on by the arbitrators.

These are the only cases in which a reference to arbitrators was allowed, shewing very clearly, I think, notwithstanding a dissentient opinion by one of the Judges of the Supreme Court, that the gross amount to be contributed by the municipality was alone subject to their award, the proper tribunal for adjusting the rights of the individuals whose lands were assessed being still the Court of Revision and the County Judge.

If this were a case in which Raleigh was assessing any lands in another municipality for benefit, I have no doubt that the Referee would be the proper party to adjudicate upon the right so to assess and as to the gross amount.

This is not a case of that kind, and the question to my mind is, whether, in the recent enactment authorizing the assessment in another township for outlet, the Legislature has intended to import the machinery created under sections 579 *et seq.*, or to give power to one township to levy assessments upon lands in another, or has failed to provide the proper means to enforce the provisions of these new enactments.

Section 585, as I read it, provides that in any case wherein the better to maintain any drain, or to prevent damage to adjacent lands, it shall be deemed expedient to change the course of such drain or make a new outlet, or otherwise extend, improve, or alter the drain, the council of the municipality whose duty it is to preserve and maintain the drain, may, on the report of an engineer, undertake and complete the alterations or improvements or

Judgment.

BURTON,
J.A.

It is said that Harwich has done nothing since the amendment to the statute was passed, but at the time of the passing it was using this drain as an outlet and comes, therefore, directly within it, although roads are not mentioned in section 590. If I am right in my interpretation the sections referred to in it warrant the assessment.

On the whole, with some doubt as to the proper interpretation of the amended section, I agree with the learned Referee in his conclusions and think the appeal should be dismissed.

OSLER, J. A. :—

I am of opinion that the appeal should be allowed. I think that notwithstanding the amendments to sections 585 and 590 of the Municipal Act, R. S. O. ch. 184, which now (as amended) appear in the corresponding sections of the Municipal Act of 1892, 55 Vic. ch. 42 (O.), the case is governed by our decision in *In re Orford and Howard*, 18 A. R. 496.

I think that if the Legislature meant to place such an extraordinary burden upon an upper township as is here sought to be placed by Raleigh upon Harwich, which neither needs, nor is benefited by, the proposed works, they would have said so in clear and unmistakeable language. If the respondents' contention prevails there seems nothing to prevent Raleigh from assessing Harwich for outlet, not merely anywhere along its border, wherever a drain from Harwich enters into one of Raleigh's drains, but also anywhere across the whole of that township wherever it can be seen that the Harwich waters are led or pass through it by means of Raleigh's drains until they leave it. I see not why Tilbury East and other lower townships may not do the same until the waters are finally discharged into the Thames. But proceedings of the kind which Raleigh now proposes to take are not, I think, in the contemplation of the Act.

MACLENNAN, J. A. :—

Judgment.

MACLENNAN,
J. A.

I do not see how, consistently with our judgment in *In re Howard and Orford*, 18 A. R. 496, we can uphold the decision of the learned Referee.

The two cases are precisely alike in their circumstances. In the former case the township of Howard sought to charge lands in Orford with a proportion of the cost of enlarging and deepening an original watercourse within the limits of Howard, not because the work would in any way benefit lands in Orford but because the drainage of Orford reached the watercourse intended to be enlarged and deepened, above the proposed improvements, and would, therefore, necessarily use the improved channel as an outlet. Precisely the same thing is sought to be done in this case by the township of Harwich. In the former case it was contended that the proposed assessment was authorized by section 590 of the Municipal Act, as found in the Revised Statutes of 1887 and amended by 52 Vic. ch. 36, sec. 37, and 53 Vic. ch. 50, sec. 37. In the present case the corresponding section (590) of the Municipal Act of 1892, 55 Vic. ch. 42 (O.), is relied on, but it is said that it has been so amended that what we decided could not be done by the township of Howard, can now be done by the township of Raleigh, and I think the question which we have to determine is whether that is so.

In his judgment the learned Referee admits that the proposed work is of no benefit to Harwich. He says: "I have not overlooked the fact, and it is a fact which Harwich and Tilbury are entitled to the benefit of, if I am wrong in my decision, that the work now proposed by Raleigh is not at all necessary for the higher townships. Mr. McGeorge himself says: The Harwich lands are fifty feet above the Raleigh lands, and there is a rapid fall; that the drainage of these lands in Harwich or Tilbury East will not be improved, so there is no pretence that the lands in Harwich or Tilbury East could be assessed for benefit. If they cannot be assessed by Raleigh under section 590 they cannot be assessed at all."

Judgment.

MACLENNAN,
J.A.

At the outset it is a somewhat startling proposition to say that the Legislature has enacted that landowners shall be chargeable with large sums for which there can be no pretence that they have received or can receive any benefit. Such legislation could hardly be called by any other name than confiscation, and before we can uphold the judgment of the learned Referee we must be very clear that such is the meaning and intention of the language used by the Legislature.

In his judgment in the *Howard and Orford* case the Chief Justice has pointed out the important difference between an original drain wholly artificial, and a drain which was originally a watercourse, which has been enlarged or deepened under the drainage laws. The first is a *quasi* private work for the use and benefit of those only who have constructed it, and into which other persons have no right to lead or turn their water. The other is still a watercourse, with all its legal incidents, and among others the right of all persons to use it as it passes by or through their land, for drainage purposes. Now, what the people of Harwich did was to make one of the creeks which naturally flowed through their township drain their land. That was their common law right, a right recognized by the provisions of the Ditches and Watercourses Act ever since the year 1834, and if they deepened and straightened their watercourses in their own territory, or even outside of their own territory, so long as they did it with proper legal authority, their right to use them for drains was thereby in no way impaired or lessened, nor was the legal character of that right in any way changed or altered. Their legal right to use the watercourses for drainage purposes remained and continued as it had been from the beginning.

It was, however, attempted to be shewn that what were called creeks, and through and along which the Harwich drains were made, were not legal watercourses at all, but were mere swales of stagnant water, which gave the Harwich people no legal right to turn their water down into Raleigh. I have considered the evidence on this point

with great care, and I think it clear the creeks were legal watercourses. If there be a stream of flowing water with well defined banks at some points, but which at intermediate points spreads out into something like a pond or small lake, I cannot doubt the whole is a legal watercourse, and the owner of the pond or small lake may by excavation and embankment confine it to a narrow channel when it passes through his land, and it is still notwithstanding a natural watercourse. Before the country was cleared of the forest the water of all streams was obstructed and hindered in its flow, more or less, by fallen timber, and the same thing often caused the water to spread over wide spaces, after heavy rains or freshets, and in applying the definitions of a watercourse to be found in the English books the difference between a country cleared and cultivated and one covered by the original forest may not be forgotten. The original condition of the territory in question in this case is well shewn in the copy of the original map of the township of Raleigh, surveyed in the year 1821, which is in evidence, and which shews a great number of streams flowing towards and discharging in the Raleigh plains, which are stated on the face of the plan to be the outlet of all the waters of Raleigh with a trifling exception. While, therefore, it is true that when the report now in question was made the people of Harwich were draining their lands into channels which led the water to the Raleigh Plain's drain and the Jeannette creek where the proposed work is to be done, these channels were, and always had been, natural watercourses, which they had a legal right to use for that purpose; and they were not in any way concerned with what became of the water, or with its action far down the stream. That also was the condition of matters when section 590 was amended and enacted in its present form on the 14th of April, 1892; and it is not disputed that the people of Harwich have done nothing since the latter date to subject them to the assessment complained of.

Judgment.

MACLENNAN,
J.A.

The question then is whether section 590 authorizes that

Judgment. assessment. The work for which it is proposed to charge
MACLENNAN, the people of Harwich is the enlargement and deepening
J.A. of the Raleigh Plain's drain and the Jeannette creek, which together form the outlet for the greatest part of the drainage of Raleigh and a great part of that of Harwich, and while both the creek and the drain were originally natural watercourses, they were both a good many years ago deepened and enlarged under the drainage laws, so that they no doubt come within the description of the drains dealt with by section 585 of the Municipal Act; and it is under the authority of that section that the work is proposed to be done. The work is said to be necessary in order to prevent damage to adjacent lands, and the respondents are proceeding without petition. They claim, as expressed in that section, that the engineer has the power to assess which is conferred by the previous sections of the Act, and also by section 590.

This amended section 590, as remarked by my brother Osler in the *Howard and Orford* case, provides for two classes of cases, though the cases are not the same as they were under the old section. The two which alone can be regarded as in any way bearing on the present appeal are these: 1. A drain already constructed used as an outlet for the water of the lands of another municipality; and 2, water from the lands of any municipality by any means caused to flow upon and injure the lands of another municipality. Now, taking the first case, let us see what the Legislature says. Neglecting immaterial words, it is this: If a drain already constructed is used as an outlet for the water of the lands of another municipality, the lands that use such drain as an outlet either immediately or by means of another drain from which water is caused to flow upon and injure lands, may be assessed in such proportion and amount as may be ascertained by the engineer under the formalities provided in the foregoing sections for the construction and maintenance of the drain so used as an outlet, or for the construction and maintenance of such drain or drains as may be necessary for carrying from such lands the waters so caused to flow upon and injure the same.

Then, taking the other case, it will read thus: If from the lands of any municipality water is by any means caused to flow upon and injure the lands of another municipality, then the lands that use such drain as an outlet either immediately or by means of another drain from which water is caused to flow upon and injure lands may be assessed for construction and maintenance as before. It may as well be remarked at once upon this case that it seems altogether insensible, and that the words "if from the lands of any municipality," etc., must have been inserted into or allowed to remain in the clause from inadvertence and without perceiving that they did not harmonize with the rest of the section. If, therefore, the Referee's judgment can secure any support from the section it must be from the first case provided for as above expressed.

Judgment.
MACLENNAN,
J.A.

Now, if the words "drain already constructed," be used in the widest sense, and to include original watercourses which have been improved by deepening or widening under the drainage laws, it must be conceded that they include the present case; because the drain proposed to be improved is in part the outlet for the Harwich waters, and the question is whether the words are so used, or ought to be so construed. In the first place the words themselves are not strictly appropriate to such a case. They do not naturally suggest to the mind an original watercourse which has been deepened or widened, but rather a drain which is wholly artificial. And so in section 569 the authority given to municipalities is expressed to be for the deepening or straightening of any stream, creek or watercourse, or for the draining of property, or for the removal of any obstruction which prevents the free flow of the waters of any stream, creek or watercourse, etc. So also the form of by-law, prescribed by section 570, distinguishes between deepening streams and drainage in the proper sense, and the same distinction is made in section 581 (2). No doubt it must be admitted that in some other sections of the Act as 583 (3) and 585, a larger meaning ought to be given to the word "drain," but that is to be done by con-

IN RE HANNA ET AL. V. COULSON.

Prohibition—Division Court—Garnishee—Defendant—After Judgment Summons—R. S. O. ch. 51, sec. 235.

A garnishee is not a defendant within the meaning of sections 235 *et seq.* of the Division Courts Act, R. S. O. ch. 51, and is not examinable under after-judgment summons.

Judgment of the Queen's Bench Division, 23 O. R. 493, affirmed.

Statement

THIS was an appeal by the primary creditors from the judgment of the Queen's Bench Division, reported 23 O. R. 493.

The primary creditors obtained a judgment in the Division Court for \$200 against a primary debtor and a garnishee, and then issued an after-judgment summons against the latter. He moved for prohibition, which was granted by the Queen's Bench Division, and the appeal of the primary creditors was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A., on the 17th of September, 1894.

Aylesworth, Q. C., for the appellants. The word "defendant" cannot have been used in sections 235 to 248 of the Division Courts' Act in the strict technical sense, for speaking precisely there is no defendant after judgment, but as equivalent to "judgment debtor." While it is true that the amendment instituting garnishment proceedings was passed after the introduction of the provisions for judgment summons, it must be assumed, in the absence of an express declaration to that effect, that the Legislature intended that all parts of the Act as amended should harmonize and not that the new provisions should constitute a distinct and exclusive remedy, resort to which should preclude the subsequent application of other relief provided by the same Act. The use of the terms "primary creditor," "primary debtor" and "garnishee," in garnishment proceedings, is for convenience only, to avoid the confusion that would arise if the word "de-

fendant" were used as applicable to two different persons defending in different interests and with different rights in the same suit, but after judgment the same confusion need not be apprehended. The use of the adjective "primary" in designating the parties to the principal suit involves the conclusion that there are in that suit a secondary creditor and debtor between whom an issue is to be made and tried and judgment rendered. There is no distinction in the Division Courts' Act and none in reason between a garnishee, after a judgment against him, which constitutes him a judgment debtor, and any other judgment debtor. By garnishment proceedings, the primary creditor is, to the extent of his claim against the primary debtor, subrogated to the rights of such primary debtor against *his* debtor, the garnishee, and in the absence of an express provision to the contrary, the primary creditor should have, against the garnishee after judgment, all the means of enforcing payment given by the statute: *Cowan v. Carlill*, 52 L. T. N. S. 431; 33 W. R. 583.

J. B. Clarke, Q. C., and *Charles Swabey*, for the respondent. The provisions respecting garnishment of debts in Division Courts were first introduced in 1869 by 32 Vic. ch. 23, secs. 5 *et seq.* (O.), and it is to be noted that, notwithstanding the introduction of these provisions, no change has at any time been made in the sections authorizing the examination of judgment debtors, so as to make those sections applicable, in so many words, to the case of a garnishee who has been ordered to pay to the primary creditor the amount of a debt due by him to the primary debtor. The language used in sections 235, *et seq.*, of the present Act, is clear, and a garnishee is not and cannot be held to be a "defendant" as that term is used in these sections, which, as they authorize the Judge, before whom the examination is had, to commit the party who has been examined to gaol in certain cases, must be construed strictly. It was held in *In re Holland v. Wallace*, 8 P. R. 186, that a garnishee was not a defendant within the meaning of R. S. O. (1877), ch. 47, sec. 62, now section

Argument.

Argument. 81 of R. S. O. ch. 51, and the same meaning should be given to that word in section 235. And see *Cameron v. Allen*, 10 P. R. 192. A garnishee is merely a person warned not to pay money to the defendant who is indebted to the plaintiff: *Wood v. Joselin*, 18 A. R. 59 ; *In re Stanhope Silkstone Collieries Co.*, 11 Ch. D. 160 ; *Chatterton v. Watney*, 17 Ch. D. 259 ; *In re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99. *Cowan v. Carlill*, 52 L. T. N. S. 431 ; 33 W. R. 583, was decided on a statute entirely different from that in question here.

Aylesworth, Q. C., in reply.

November 13th, 1894. OSLER, J. A. :—

This is an appeal from the judgment of the Queen's Bench Division, ordering prohibition at the instance of the garnishee against proceedings taken by the plaintiffs in the 5th Division Court of Essex to examine him as a judgment debtor, and the sole question is, whether a garnishee is a defendant within the meaning of section 235 of the Division Courts Act, who is liable to be so examined. I agree with the Queen's Bench Division that he is not. A distinction has always been maintained in the Act between the plaintiff and the defendant and garnishee. The two former are parties to the action. The latter is not. The proceeding against him is collateral to the action ; it is by way of attaching the debt he owes to the primary debtor who is always the defendant. A garnishee is not a defendant within the meaning of section 81, which provides that any action cognizable in a Division Court, may be entered and tried in the Court holden for the division in which the course of action arose, or in which the defendant or any one of several defendants resides in or at the time the action is brought : *In re Holland v. Wallace*, 8 P. R. 186. The case of the garnishee in this respect is specially provided for by another section, section 185. And until the law was altered a garnishee had no right of appeal under the Division Courts Act of 1880, as being " a party to a cause ":

Cameron v. Allen, 10 P. R. 192; and see *In re Turner v. Imperial Bank*, 9 P. R. 19. The proceedings, in short, by and against him, are special. Nowhere in the Act will he be found identified as or confounded with the defendant.

Judgment.

OSLER,
J.A.

No doubt he becomes in one sense of the word a judgment debtor when a judgment to pay over the debt attached has been made against him under section 184; but he is not, in my opinion, such a judgment debtor as section 235 relates to. That, and the following sections, down to 248, are placed under the heading "Examination of judgment debtors," but section 235 plainly shews that it is the defendant in the action who is subject to its provisions, for the person to be examined, who is described as the defendant, is to be examined touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability which formed the subject of the action, language which is strictly appropriate to the case of the primary debtor, but not to one who is merely liable as garnishee, and is not in the ordinary sense of the word a party to the cause. "Subject" of the action is that, in the absence of which the action would not be maintainable at all, and has no meaning as applied to the claim against the garnishee, which is no more than a species of execution, and is not that for which the creditor is suing, since a garnishment is no sense an assignment of the debt attached thereby. See *Wood v. Joselin*, 18 A. R. 59, and *In re Stanhope Silkstone Collieries Co.*, 11 Ch. D. 160; *Chatterton v. Watney*, 17 Ch. D. 259, and *In re Combined Weighing and Advertising Co.*, 43 Ch. D. 99, there cited. It is well observed in the judgment of the learned Chief Justice in the Court below, that the clauses of the Division Courts Act relating to the examination of judgment debtors existed in substantially the same words long before the introduction of the garnishment clauses. "Defendant," in what is now section 235, then meant the person sued in the action, and by no subsequent legislation has its meaning been altered.

When it is seen that this garnishee is liable to be exam-

Judgment.

OSLER,
J A

ined by his own judgment creditor on the judgment obtained against him in the High Court, the justice of compelling him to submit to an examination in the Division Court as a garnishee in respect of the same judgment, with possible results as to imprisonment, which would not follow on the other, is not apparent. The Legislature has, however, in its wisdom, now thought proper to provide that in future cases it may be done, as by 57 Vic. ch. 23, section 18 (O.), clauses 235 to 248 have been made applicable to a garnishee against whom judgment has been recovered under sections 184 or 187 of the Act. This Act was passed a few days before the judgment now in appeal was delivered, but of course cannot affect the present case.

The appeal must be dismissed with costs.

MACLENNAN, J. A. :—

I think that the judgment must be affirmed. It would, in my opinion, be an unwarrantable extension of the meaning of the language of section 235 of the Division Courts Act to apply it to the case of a garnishee. The plaintiffs cannot be said to have an unsatisfied judgment or order for the payment of any debt, damages, or costs against the appellant. Notwithstanding the garnishment proceedings the garnishee's debt is still due to his own creditor and not to the appellants, and the appellants attach it and receive it, if and when they do receive it, not as something due to them from the garnishee, but as something belonging to their debtor, which they have been enabled to lay hold of by the process of the Court. I think it is evident from its whole scope that section 235 was not intended to include the case of a garnishee, and that the judgment or order there referred to means an ordinary judgment or order between the parties to an action.

I think the judgment of the Court of Appeal in *In re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99, is conclusive against the appeal. At p. 105, Bowen, L. J., shews that garnishment creates no debt either

legal or equitable from the garnishee to the judgment creditor, and that it does not operate as an assignment. Judgment.
MACLENNAN,
J.A.
The Lord Justice says: "There is an order of a Court of common law that a sum equal to the original debt shall be paid by the garnishee to the judgment creditor, or as an alternative that execution may issue; but I think that the relation which is created by that section and the orders made under it does not create a debt at all; it creates an attachment of a portion of the debt, and in case of non-payment confers the right of issuing execution and nothing more."

It is to be observed also that the examination provided for under section 235 is concerning a debt, that is a debt due to the party examining, and if there be no debt to him, then the section is wholly inapplicable.

BURTON, J. A. :—

I agree in dismissing this appeal for the reasons given by Armour, C. J. Any other interpretation of the statute might expose a person whose debt has been garnished to most serious inconveniences, and until the Legislature has expressed in unmistakeable terms that it means to extend the meaning of the word to a garnishee I shall decline so to construe it.

HAGARTY, C. J. O. :—

I agree.

Appeal dismissed with costs.

END OF VOLUME XXI.

APPENDIX.

Cases reported in the Ontario Appeal Reports disposed of by the Judicial Committee of the Privy Council and the Supreme Court of Canada, since the publication of volume 20, up to January 1st, 1895.

Judicial Committee of the Privy Council.

IN RE ASSIGNMENTS AND PREFERENCES ACT, 20 A. R. 489.—Appeal allowed; February 24th, 1894: *sub nom.* ATTORNEY-GENERAL OF ONTARIO V. ATTORNEY-GENERAL FOR THE DOMINION OF CANADA, [1894] A. C. 189; 6 R. 6.

Supreme Court of Canada.

ALLISON V. McDONALD, 20 A. R. 695.—Appeal dismissed; October 9th, 1894: 23 S. C. R. 635.

ATTORNEY-GENERAL FOR CANADA V. ATTORNEY-GENERAL FOR ONTARIO, 19 A. R. 31.—Appeal dismissed; March 13th, 1894: 23 S. C. R. 458.

BEAVER V. GRAND TRUNK R. W. Co., 20 A. R. 476.—Appeal allowed; February 20th, 1894: 22 S. C. R. 498.

CROOKS V. ELLICE, 20 A. R. 225.—Judgment varied and appeal dismissed; May 31st, 1894: 23 S. C. R. 429.

ERDMAN V. TOWN OF WALKERTON, 20 A. R. 444.—Appeal dismissed; May 31st, 1894: 23 S. C. R. 352.

FRANK V. SUN LIFE ASSURANCE Co., 20 A. R. 564.—Appeal dismissed; May 22nd, 1894: 23 S. C. R. 152(n.)

ASSIGNMENTS AND PREFERENCES.

1. *Sale of Insolvent's Estate—Secret Profit by Creditor—Inspector—Trusts.*—The assets of an insolvent estate were sold by the assignee at a price that was not complained of, to the insolvent's wife, with the approval of the sole inspector of the estate, the inspector and another creditor becoming responsible for the payment of the purchase money, and pursuant to a pre-existing undisclosed agreement taking from the purchaser a chattel mortgage upon these assets as security not only for the amount of the purchase money but also for the full amount of their claims against the debtor:—

Held, per HAGARTY, C.J.O. That the transaction was, legally speaking, an improper one, but that, there being no evidence that any loss had been caused to the estate or any advantage obtained by the defendants, no reference should be directed.

Per BURTON, and MACLENNAN, JJ.A. That the inspector and the creditor could not be ordered to account for the profit, if any, made by them, that profit not having been made at the expense of the estate or by virtue of the office of trust filled by the inspector.

Per OSLER, J. A. That it was not shewn that the best price had been obtained; that any profit must be accounted for, and that a reference to ascertain the amount thereof should be directed.

In the result the judgment of the Queen's Bench Division, 23 O. R. 573, was reversed. *Segsworth et al. v. Anderson et al.*, 242.

2. *Covenant of Indemnity—R. S. O. ch. 124, sec. 4.*—The benefit of a covenant by a third person to in-

demnify the assignor against a mortgage made by him does not pass to his assignee under an assignment for the general benefit of creditors, at all events not where there has been no breach of the covenant before the making of the assignment.

Per MACLENNAN, J. A.:—Even if the covenant passed, the assignee would hold it as bare trustee for the assignor, or for the mortgagees if subsequently assigned to them by the assignor.

Judgment of the Queen's Bench Division, 25 O. R. 50, reversed. *Ball v. Tennant*, 602.

See BANKS AND BANKING—BILLS OF SALE AND CHATTEL MORTGAGES, 1, 2.

ATTACHMENT.

Contempt of Court—Payment of Money—R. S. O. ch. 67, sec. 6—Practice—Rules 878 et seq.—Section 6 of R. S. O. ch. 67, which abolishes process of contempt for nonpayment of any sum of money payable by a judgment or order, refers to payment of money as between debtor and creditor; and defendants who are, by judgment, directed to procure the discharge of an encumbrance wrongfully placed by them on the plaintiff's lands may be attached for failure to comply with the judgment, although payment of money may become necessary to effect what is required.

Male v. Bouchier, 1 Ch. Ch. 359; 2 Ch. Ch. 254, overruled.

But where the judgment directs the act to be done within a limited time the defendants cannot be attached unless the judgment, with the proper notice of the penalty for default, has been served upon them

in time to give them a reasonable opportunity of complying with its terms before the expiration of the prescribed period; MEREDITH, J., dissenting on this point.

Judgment of Boyd, C., reported (*sub nom. Roberts v. Donovan*) 21 O.R. 535, affirmed on other grounds. *Berry v. Donovan*, 14.

BAILMENT.

See *Brown v. Defoe*, 466.

BANKS AND BANKING.

Security—Contemporaneous Advance—Bills of Exchange and Promissory Notes—Renewal—Substitution of Securities—Assignments and Preferences—Confession of Judgment—Cognovit Actionem—53 Vic. ch. 31, secs. 74, 75 (D.)—R. S. O. ch. 51, sec. 113—R. S. O. ch. 124, sec. 1.]—A renewal of a note is not a negotiation of it within the meaning of section 75 of the Bank Act, 53 Vic. ch. 31 (D.), so as to support a security taken at the time of the renewal in substitution for a previously existing security.

A withdrawal of defence under section 113 of the Division Courts' Act, R. S. O. ch. 51, is not a confession of judgment or *cognovit actionem* within the meaning of section 1 of the Assignments and Preferences Act, R. S. O. ch. 124.

Judgment of ARMOUR, C. J., affirmed. *Bank of Hamilton v. Shepherd et al. Bailey et al. v. The Bank of Hamilton*, 156.

See PRINCIPAL AND AGENT.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Lien Note—Negotiable Instrument—Reservation of Title.]—An instrument in the form of a promissory note, given for part of the price of an article, with the added condition "that the title and right to the possession of the property for which this note is given shall remain in (the vendors) until this note is paid" is not a promissory note or negotiable instrument, and the holder thereof takes it subject to any defence available to the maker against the vendors.*

Judgment of the First Division Court of Peel reversed. *Dominion Bank v. Wiggins*, 275.

2. *Patent of Invention—Transfer of Patent—"Given for Patent Right"—53 Vic. ch. 33, sec. 30, sub-sec. 4 (D.)—Consideration—Composition Agreement.]—Sub-section 4, of section 30, of the Bills of Exchange Act, 1890, 53 Vic. ch. 33 (D.), requiring notes, the consideration of which consists in whole or in part of the purchase money of a patent right, to have thereon the words "given for a patent right," does not apply to notes given by a firm to cover the separate debt of one of the partners, one inducement to the undebted partner for joining in the notes being, to the knowledge of the creditor, the transfer to him by the indebted partner of an interest in a patent.*

An advance of money by a creditor to a debtor whose debt has been released by a composition agreement is sufficient consideration for notes given by that debtor and his partner to the creditor for part of the released debt.

A consideration is necessary to

support a subsequent promise to pay a debt or the balance of a debt which has been released by the creditor or discharged by a deed of composition or discharge.

Austin v. Gordon, 32 U. C. R. 621, observed upon.

Judgment of the Common Pleas Division, 24 O. R. 486, reversed. *Samuel et al. v. Fairgrieve et al.*, 418.

See BANKS AND BANKING—PRINCIPAL AND AGENT.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. *Renewal—Assignment for the Benefit of Creditors*—R. S. O. ch. 124, sec. 12—R. S. O. ch. 125, secs. 11, 15.]—An assignee for the benefit of creditors under a general assignment made and registered pursuant to the Assignments and Preferences Act, R. S. O. ch. 124, may renew a chattel mortgage made in favour of his assignor, without the execution and registration of a specific assignment of that mortgage. A renewal statement, in itself in proper form, alleging title through the assignment for the benefit of creditors, is sufficient.

Judgment of the County Court of Simcoe affirmed. *Fleming et al. v. Ryan & Co.*, 39.

2. *Agreement to give Security*—R. S. O. ch. 125, sec. 6—*Assignments and Preferences*—55 Vic. ch. 26, sec. 2 (O.).]—An assignee for the general benefit of creditors is, by virtue of 55 Vic. ch. 26, sec. 2 (O.), entitled to take advantage of irregularities or defects in a chattel mortgage made by the assignor to the same extent as an execution creditor

where such mortgage is by reason of such defect "void against creditors."

As against such an assignee an oral agreement, of which he has notice, by the assignor to give to an endorser a chattel mortgage to secure him against liability, will be enforced.

Where a chattel mortgage is taken to secure a debt, the time for payment may be extended beyond a year.

Judgment of ROSE, J., affirmed. *Kerry v. James et al.*, 338.

3. *Simple Contract Creditors*—*"Void as against Creditors"*—55 Vic. ch. 26, sec. 2 (O.).]—"Void as against creditors" in section 2 of 55 Vic. ch. 26 (O.), which extends the provisions of the Act respecting Mortgages and Sales of Personal Property to simple contract creditors suing on behalf of themselves and other creditors, must be read "voidable as against creditors," and a sale of the mortgaged goods by the mortgagee before an election is made by the simple contract creditors commencing proceedings to attack the mortgage cannot be impeached.

Whether such an action can be brought by a simple contract creditor whose debt is not due, *quære*.

Judgment of ARMOUR, C. J., reversed. *Meriden Britannia Co. v. Braden et al.*, 352.

4. *Description—After Acquired Goods*—R. S. O. ch. 125, sec. 27—55 Vic. ch. 26, sec. 1 (O.).]—A description in a chattel mortgage of after acquired goods as "all other ready-made clothing, tweeds, trimmings, gents' furnishings, furniture and fixtures and personal property, which shall at any time during the currency of this mortgage be brought in or upon the said premises or in or upon any other premises in which the said mortgagor may be carrying on busi-

ness," is sufficient and binds goods of the kinds mentioned in premises to which the mortgagor moves after making the mortgage, and the amending Act 55 Vic. ch. 26 (O.) has not made any difference in this respect.

Judgment of MACMAHON, J., affirmed. *Horsfall v. Boisseau*, 663.

BOND.

See ASSESSMENT AND TAXES.

CARRIERS.

See RAILWAYS, 1, 3 — *Grant v. Northern Pacific Junction R. W. Co.*, 322.

CASES.

Austin v. Gordon, 32 U. C. R. 621, observed upon.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

Beam v. Beam, 24 O. R. 189, approved.]—*See* LIFE INSURANCE.

Cleaver v. Mutual Reserve Fund Life Association, [1892] 1 Q. B. 147, distinguished.]—*See* WILL, 3.

Coventry v. McLean, 22 O. R. 1, approved.]—*See* LANDLORD AND TENANT.

Holme v. Guppy, 3 M. & W. 387 followed.]—*See* CONTRACT, 1.

Leith v. Freeland, 24 U. C. R. 132, distinguished.]—*See* COVENANT.

Lynn, Re, Lynn v. Toronto General Trusts Company, 20 O. R. 475, approved.]—*See* LIFE INSURANCE.

Male v. Bouchier, 1 Ch. Ch. 359; 2 Ch. Ch. 254, overruled.]—*See* ATTACHMENT.

Mewburn v. Mackelcan, 19 A. R. 729, distinguished.]—*See* COVENANT.

In re Orford and Howard, 11 A. R. 496, considered.]—*See* DRAINAGE, 2.

Regina v. Belmont, 35 U. C. R. 298, questioned.]—*See* INTOXICATING LIQUORS.

Regina v. Brown and Street, 13 C. P. 615, referred to.]—*See* MUNICIPAL CORPORATIONS, 3.

Regina v. Dillon, 10 P. R. 352, approved.]—*See* GAMING.

Regina v. Louth, 13 O. P. 615, referred to.]—*See* MUNICIPAL CORPORATIONS, 3.

Robb v. Murray, 16 A. R. 503, considered.]—*See* COUNTY COURTS.

Severn v. The Queen, 2 S. C. R. 70, overruled.]—*See* CONSTITUTIONAL LAW.

St. Catharines Road Co. v. Gardner, 21 C. P. 190, referred to.]—*See* MUNICIPAL CORPORATIONS, 3.

Vogel v. Grand Trunk R. W. Co., 11 S. C. R. 612, considered.]—*See* RAILWAYS, 1.

Weir v. Canadian Pacific R. W. Co., 16 A. R. 100, considered.]—*See* NEGLIGENCE, 2.

CERTIFICATE.

See ASSESSMENT AND TAXES.

CHARITY.

See WILL, 1.

CHATTEL MORTGAGES.

See BILLS OF SALE AND CHATTEL MORTGAGES.

CHOSE IN ACTION.

See COVENANT—HUSBAND AND WIFE.

CLUB.

See COMPANY.

COGNOVIT ACTIONEM.

See BANKS AND BANKING.

COLLECTOR.

See ASSESSMENT AND TAXES.

COMPANY.

1. *Club—Expulsion of Member—Evidence—Notice.*—The directors of a club in exercising disciplinary jurisdiction under a by-law providing that “any member guilty of conduct which in the opinion of the board merits such a course may be expelled,” are not bound by legal rules of evidence, and their decision, arrived at after a fair investigation of the facts, will not be interfered with because they have admitted as part of the evidence in proof of the charge the informally sworn statement of one of the persons concerned in the transaction.

Where the charge has been made, discussed, and replied to, in the public prints, it is not necessary to give to the accused person who has taken part in such discussion, when calling upon him to shew cause against his proposed expulsion, specific particulars of the accusation; a general statement is sufficient.

Judgment of ARMOUR, C.J., affirmed. *Guinane v. Sunnyside Boating Company of Toronto et al.*, 49.

2. *Promoter—Trust—Sale of Land—Stock—Contributory—Winding-up.*—To make an alleged promoter of a company liable for the amount of paid up shares allotted to him in consideration of the transfer by him to the company of property standing in his name, it must be shewn that at the time of its acquisition by him he stood in such a relation to the intended company that he could not claim to have bought the property for himself, and, therefore, that there was no consideration for the allotment; and the Court [HAGARTY, C.J.O., dissenting], having on the evidence come to the conclusion that this was not shewn, reversed the judgment of MEREDITH, J., 23 O. R. 182. *In re The Hess Manufacturing Company; Sloan's Case*, 66.

3. *Shares—Discount—Illegal Increase of Capital—Validating Act—Winding-up.*—To attempt to make partially paid up shares in the capital stock of a company paid up shares by an allowance of a discount to the holders thereof is *prima facie* illegal, and a proviso in the Act of Incorporation “that no by-law for the allotment or sale of stock at any greater discount than what has been previously authorized at a general

meeting" is not wide enough to impliedly authorize the allowance of such a discount on shares which were originally subscribed for at their full nominal value.

An Act of Parliament reciting that a company had been "duly organized," had ceased its operations, and had been "reorganized"; and declaring that the charter is in force and the company "as now organized" capable of doing business, does not give legislative sanction to an illegal increase of the capital stock so as to make holders of shares of the illegally issued stock liable as contributories in winding-up proceedings.

Judgment of Boyd, C., 24 O. R. 216, reversed. *In re The Ontario Express and Transportation Company*, 646.

See RAILWAYS, 2.

COMPOSITION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

CONDITIONS.

See RAILWAYS, 1 — VENDOR AND PURCHASER—WILL, 3.

CONFESSION OF JUDGMENT.

See BANKS AND BANKING.

CONSIDERATION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

CONSOLIDATION.

See MORTGAGE, 4.

CONSTITUTIONAL LAW.

Liquor License Act—R. S. O. ch. 194, secs. 51 (2), and 61—Warehouse.]—Section 51 (2) of the Liquor License Act, R. S. O. ch. 194, which requires brewers licensed by the Government of Canada to take out licenses under that Act is *intra vires* provincial legislation.

Severn v. The Queen, 2 S. C. R. 70, has been in effect overruled by more recent decisions of the Judicial Committee.

A cellar in a brewery where beer is stored is a "warehouse" within the meaning of section 61 of the Act.

Judgment of the County Judge of Wellington reversed. *Regina v. Halliday*, 42.

CONTEMPT OF COURT.

See ATTACHMENT.

CONTRACT.

1. *Penalty — Delay Caused by Contractee — Damages — Time.*] — Where a contract provides that an engine shall be built and placed in position by a certain date, with a penalty for each day's delay, the time of commencement is of the essence of the contract, and if owing to the purchaser's fault, the contractor is materially delayed in commencing the work, the parties are at large so far as the penalty is concerned, the purchaser, if the work be

not completed by the time fixed, being entitled only to actual damages.

Holme v. Guppy, 3 M. & W. 387, followed.

Judgment of the Queen's Bench Division reversed. *Kerr Engine Company v. The French River Tug Company*, 160.

2. *Master and Servant—Wages—Damages—Agreement to Remunerate by Legacy.*]—Where services are rendered, not on a contract of hiring, nor gratuitously, but upon the faith of a promise to leave property by will, which the testator fails to perform, an action may be maintained against his representatives to recover compensation for the services in the shape of damages for breach of the previous promise.

The plaintiff brought the action against the executors of her grandfather's estate, alleging that for several years she had worked for her grandfather in consideration of his agreement to leave her by his will as much as any of his daughters. He left her by his will \$400, while to his daughters he left \$1,000 each, and she claimed specific performance, or in the alternative wages:—

Held, per HAGARTY, C. J. O., and BURTON, J. A.—That the plaintiff could not recover wages, but that the agreement being proved, she was entitled to recover damages for its breach, which would be, if the assets were sufficient, \$600.

Per OSLER, J. A.—That no more specific agreement was proved than that the plaintiff was to be remembered by the testator in his will, and therefore she was entitled to nothing beyond the sum left her by the will.

Per MACLENNAN, J. A.—That the agreement was proved, and that the plaintiff was entitled to recover as damages for its breach a sum equal

to the amount given to the least favoured daughter, to be ascertained in due course of administration.

In the result the judgment of FALCONBRIDGE, J., in the plaintiff's favour, was affirmed with a variation. *Smith v. McGugan*, 542.

See SALE OF GOODS.

CONTRIBUTORY.

See COMPANY, 2.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 2.

CORPORATION.

See COMPANY — MUNICIPAL CORPORATIONS.

CORROBORATION.

See WILL, 2.

COSTS.

See NUISANCE.

COVENANT.

Indemnity—Assignment—Ascertainment of Liability—Chose in Action—Unliquidated Damages—Action Quia Timet.]—Upon a covenant by an incoming partner to indemnify and save harmless a retiring partner against the liabilities, contracts and agreements of the firm, no cause of action accrues to the covenantee merely because an action

to recover unliquidated damages for an alleged breach of agreement has been brought against the firm.

Mewburn v. Mackelcan, 19 A. R. 729; and *Leith v. Freeland*, 24 U. C. R. 132, distinguished.

Such a covenant is not assignable by the covenantee to a plaintiff suing the firm so as to enable him to join the covenantor as a defendant in the action to recover against him the damages for which the firm may be ultimately held responsible.

Judgment of GALT, C. J., affirmed. *Sutherland v. Webster*, 228.

See ASSIGNMENTS AND PREFERENCES, 2.

COUNTY COURT.

Jurisdiction—Claim over \$200—Liquidated or Ascertained Amount—R. S. O. ch. 47, sec. 19, sub-sec. 2.]

—Whenever a sum up to \$400 is agreed on by the parties as the remuneration for a service to be performed, or as the price of any article sold, if the service be performed or the article be delivered in pursuance of the bargain, the amount may be recovered in the County Court, denial of the contract and price not availing to oust the jurisdiction.

Robb v. Murray, 16 A. R. 503, considered.

Judgment of the Queen's Bench Division affirmed. *Ostrom v. Benjamin* (No. 2), 467.

CROWN LANDS DEPARTMENT.

See TIMBER.

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DAMAGES.

Remoteness — Expulsion from Street Car—Taking Cold.]—Where there was some evidence that serious illness from which the plaintiff had suffered had resulted from exposure to cold upon illegal expulsion from a street car an award of damages in respect of that illness was upheld.

Judgment of the Common Pleas Division, 24 O. R. 683, affirmed, HAGARTY, C. J. O., dissenting. *Grinsted v. The Toronto Railway Co.*, 578.

See CONTRACT, 1, 2—COVENANT—NEGLIGENCE, 4, 6—RAILWAY, 1.

DEBTOR AND CREDITOR.

See PRINCIPAL AND AGENT.

DEDICATION.

See WAYS.

DEED.

Description — Evidence — Falsa Demonstratio.]—The deed to the plaintiff in an ejectment action purported to convey "part of lot forty-three," described as "commencing in the southerly limit of said lot forty-three, at a distance of twenty feet from the water's edge of the Detroit river, thence northerly, parallel to the water's edge 208 feet, thence westerly parallel to the said southerly limit 600 feet, more or less, to the channel bank of the Detroit river, thence southerly, following the channel bank 208 feet, thence easterly 600 feet, more or less, to the place of beginning, together

with the fishery privileges appurtenant to the premises hereby conveyed":—

Held, that the patent of lot forty-three might be looked at to ascertain the point of commencement; that as that lot was described as running to the water's edge of a navigable river, the point of commencement must be taken to be twenty feet landwards, and that the plaintiff was entitled to claim the strip of twenty feet along the water's edge.

Judgment of the Queen's Bench Division reversed. *Scotten v. Barthel*, 569.

DELAY.

See CONTRACT, 1.

DESCRIPTION.

See BILLS OF SALE AND CHATTEL MORTGAGES, 4 — DEED — SALE OF GOODS.

DISCOUNT.

See COMPANY, 3.

DIVISION COURT.

See PROHIBITION.

DRAINAGE.

Petition — Withdrawal.] — The plaintiff in 1884, after signing a petition for the construction of a drain, wrote to the council objecting to the work for reasons set out, but in 1885 the council passed the necessary by-law and issued deben-

tures. Subsequently the plaintiff gave notice of his intention to move to quash the by-law, but afterwards he withdrew this notice and tendered for the work. In 1889, he attacked the by-law, alleging, among other grounds, that it was void by reason of his withdrawal:—

Held, per HAGARTY, C. J. O., that before 53 Vic. ch. 50, sec. 35 (O.), a petitioner could not withdraw.

Per BURTON, J. A.—That there was no power of withdrawal, and that in any event the question whether there had been withdrawal or not, was for the council.

Per OSLER and MACLENNAN, J.J.A.—That there was a power of withdrawal, but that there had in fact been no withdrawal, and that even if there had the plaintiff was estopped from maintaining the action, his conduct having been such as to induce the council to believe that their jurisdiction was not contested.

Judgment of the Queen's Bench Division reversed. *Gibson v. Township of North Easthope*, 504.

2. *Municipal Corporations* — 55 Vic., ch. 42, sec. 490 (O).—*Held, per* HAGARTY, C. J. O., and BURTON, J. A.:—Where a drain constructed or improved by one municipality affords an outlet, either immediately or by means of a drain or natural watercourse flowing from lands in another municipality, the municipality that has constructed or improved the outlet can, under section 590 of the Consolidated Municipal Act of 1892, 55 Vic. ch. 42 (O.), assess the lands in the adjoining municipality for a proper share of the cost of construction or improvement, and the Drainage Referee has jurisdiction to decide all questions relating to the assessment.

Per OSLER, and MACLENNAN,

JJ.A. :—The section applies only to drains properly so called, and does not extend to or include original watercourses which have been artificially deepened and enlarged, and *In re Orford and Howard*, 18 A. R. 496, still governs.

The Court being divided in opinion, the judgment of the Drainage Referee upholding the right to assess was affirmed. *In re Township of Harwich and Township of Raleigh*, 677.

See MUNICIPAL CORPORATIONS, 4.

EASEMENT.

See REGISTRY ACT—STATUTE OF LIMITATIONS, 2.

ESTATE TAIL.

See WILL, 2.

EVIDENCE.

Survey — Plan — Description.]—The description of a lot prepared for and used by the Crown Lands Department in framing the patent, which grants the lot by number or letter only, is admissible evidence to explain the metes and bounds of that lot.

The plan of survey of record in and adopted by the Crown Lands Department governs on a question of location of a road, when the surveyor's field notes do not conflict with the plan and no road has been laid out on the ground.

Judgment of the Common Pleas Division reversed. *Kenny v. Caldwell*, 110.

See COMPANY, 1—DEED—NEGLIGENCE, 1, 2, 3, 5, 6—RAILWAYS, 4—WILL, 1.

EXECUTORS AND ADMINISTRATORS.

See LIFE INSURANCE—WILL, 1.

FELONY.

See WILL, 3.

FIRE INSURANCE.

See MORTGAGE, 3—RAILWAYS 2.

FIXTURES.

See MORTGAGE, 3.

FORFEITURE.

See LANDLORD AND TENANT—WILL, 3.

GAMING.

Wager—Illegality—Stakeholder—R. S. C. ch. 159, sec. 9.]—R. S. C. ch. 159, sec. 9, is aimed at the suppression of the *business* of betting and pool selling, and does not apply to bets between individuals, whether stakes are or are not deposited in the hands of a third person. And while a bet between individuals as to the result of a parliamentary election is illegal, it is not a misdemeanour to make such a bet, and either party may, before the money has been paid over by the stakeholder, recover back from him the amount deposited by that party.

Regina v. Dillon, 10 P. R. 352, approved.

Judgment of the Common Pleas Division affirmed, *Boyd, C.*, dissenting. *Trebilcock v. Walsh*, 55.

GARNISHEE.

See PROHIBITION.

GIFT.

See HUSBAND AND WIFE.

HIGH SCHOOLS.

Alteration of Districts—54 Vic. ch. 57, sec. 6 (O.)—57 Vic. ch. 58, sec. 1 (O.).—Under section 6 of the High Schools Act, 54 Vic. ch. 57 (O.), as amended by 57 Vic. ch. 58, sec. 1 (O.), a county council has power to detach a township from a high school district without the consent of that township or of the other townships included in the high school district in question.

Judgment of *ROBERTSON, J.*, affirmed, *OSLER, J. A.*, dissenting. *In re Wilson and the County of Elgin*, 585.

HIGHWAY.

See MUNICIPAL CORPORATIONS, 2 — NEGLIGENCE, 1, 3, 4.

HUSBAND AND WIFE.

Gift—Chose in Action—Knowledge of Transfer.—Since the Married Women's Property Act of 1884,

a husband may make a valid gift of a chose in action to his wife without the intervention of a trustee.

A gift to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of it.

Judgment of *ROSE, J.*, affirmed. *Sherratt v. The Merchants' Bank of Canada*, 473.

See LIFE INSURANCE.

ICE.

See MUNICIPAL CORPORATIONS, 2.

ILLEGALITY.

See GAMING.

INDEMNITY.

See COVENANT.

INSPECTOR.

See ASSIGNMENTS AND PREFERENCES, 1.

INTOXICATING LIQUORS.

Powers of License Commissioners—License Regulations—Liquor License Act, R. S. O. ch. 194.—A regulation by License Commissioners requiring the lower half of bar-room windows to be left uncovered during prohibited hours is valid and reasonable.

Regina v. Belmont, 35 U. C. R. 298, questioned.

Judgment of the County Judge of Wellington reversed. *Regina v. Martin*, 145.

See CONSTITUTIONAL LAW.

JUDGMENT SUMMONS.

See PROHIBITION.

JURISDICTION.

See COUNTY COURT.

LANDLORD AND TENANT.

Lease — Forfeiture — Option to Purchase.]—The Court will not make a declaration relieving against forfeiture of a lease for nonpayment of rent when the trial of the action for that relief takes place after the term has expired by effluxion of time, even though the lease gives an option of purchase to be exercised during the term, which the lessee had attempted to exercise after the forfeiture.

A lessee is not entitled as of right to relief against forfeiture for non-payment of rent. That relief may be refused on collateral equitable grounds.

Coventry v. McLean, 22 O. R. 1, approved.

Judgment of BOYD, C., affirmed. *Coventry v. McLean*; *Coventry v. McLean et al.*, 176.

LEASE.

See LANDLORD AND TENANT — *Brethour v. Brooke et al.*, 144.

LEGACY.

See CONTRACT, 2—WILL, 1.

LICENSE.

See INTOXICATING LIQUORS—TIMBER.

LICENSE COMMISSIONERS.

See INTOXICATING LIQUORS.

LIEN.

Artisan's Lien — Brick-maker.]—A brick-maker who makes bricks for another person in a brickyard belonging to that person and has possession of the brickyard while engaged in making the bricks, is entitled to a lien upon them as against an execution creditor or chattel mortgagee of the owner.

Judgment of BOYD, C., 25 O. R. 194, affirmed. *Roberts v. The Bank of Toronto et al.*, 629.

See MORTGAGE, 3.

LIEN NOTE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

LIFE INSURANCE.

Husband and Wife—Will—R. S. O. ch. 136, sec. 5—Executors and Administrators—Form of Judgment — Plene Administravit — Assets Quando.]—A bequest of a policy of life insurance to the testator's wife is a valid declaration of trust within

the meaning of R. S. O. ch. 136, sec. 5.

Re Lynn, Lynn v. Toronto General Trusts Company, 20 O. R. 475, and *Beam v. Beam*, 24 O. R. 189, approved.

Judgment of the County Court of Prince Edward on this point affirmed, OSLER, J. A., dissenting.

The practice in force before the Judicature Act, under which a plaintiff taking issue on and failing on an executor's plea of *plene administravit*, could not have judgment of assets *quando*, no longer exists, and it is now proper to give a plaintiff judgment of assets *quando*, if his debt be established and such a judgment be desired.

Judgment of the County Court of Prince Edward on this point reversed. *McKibbon v. Feegan*, 87.

LIMITATION OF LIABILITY.

See RAILWAYS, 1.

MACHINERY.

See MORTGAGE, 3.

MANSLAUGHTER.

See WILL, 3.

MARSHALLING.

See WILL, 1.

MASTER AND SERVANT.

Workmen's Compensation for Injuries Act—R. S. O. ch. 141—*Way*—*Defect*—*Hoist*.]—The plaintiff, a

workman, in going to his work, in the defendants' manufactory, passed as usual through a long passage, twelve feet wide, well lighted, and with which he was well acquainted, but instead of going straight to his work turned out of his way to look at some repairs that were being made on the elevator on the opposite side of the passage from where he should have been, and fell into the unguarded hole :—

Held, that there was no defect in the condition of the "way," within the meaning of the Workmen's Compensation for Injuries Act, R. S. O. ch. 141, for which the defendants were responsible.

Judgment of the Chancery Division, 23 O. R. 335, affirmed on other grounds. *Headford v. McClary Manufacturing Co.*, 164.

See CONTRACT, 2.

MAXIMS.

Res ipsa loquitur.]—See NEGLIGENCE, 4, 5.

Omnia præsumentur rite esse acta.]—See WAYS.

MORTGAGE.

1. *Priorities — Assignment*.]—A testator devised the north half of his farm to one son and the east half of the south half to another son, the latter half being subject to mortgage. The devisee of the north half made several payments to the mortgagees, without any demand from them, reducing the mortgage debt to about \$100. The devisee of the east half of the south half gave a mortgage on his land, this mortgagee, before advancing the money, communicating

with the former mortgagees and obtaining from them a statement shewing the balance due to be about \$100, and then registering the mortgage. Subsequently the owner of the north half paid this balance and took an assignment expressed to be in consideration of \$1.00, and in these proceedings he claimed that he was entitled to hold the assignment for the full amount paid by him:—

Held, per HAGARTY, C. J. O., and OSLER, J. A. That there was nothing to shew that the payments, other than the last, were made on the faith of getting the assignment, and that even if they had been so made the right to an assignment was an equitable one and could not prevail against the duly registered second mortgage.

Per BURTON, J. A. That, on the evidence, it was not shewn that the payments had been made with the intention of taking an assignment.

Per MACLENNAN, J. A. That the payments by the devisee of the north half were properly made in view of the possible resort to the north half in case of deficiency in value of the south half but that the equitable right could not prevail against the duly registered second mortgage.

In the result the judgment of MEREDITH, J., 23 O. R. 351, was affirmed. *McMillan v. McMillan*, 343.

2. *Payment—Solicitor—Authority of.*]—The onus of shewing that a solicitor who is in possession of a mortgage and collects the interest has authority also to collect the principal, is upon the mortgagor, and unless this onus is clearly discharged, the mortgagor and not the mortgagee must bear the loss arising from the solicitor's misappropriation of the funds.

Judgment of ROBERTSON, J., re-

versed. *In re Tracy, Scully v. Tracy*, 454.

3. *Fixtures — Machinery — Lien Agreement—Double Fire Insurance.*]

—The plaintiffs sold certain mill machinery under an agreement which provided that a mortgage of the mill property was to be given to them by the purchasers to secure the price; that the machinery was not to form part of the real estate, but was to remain personal property; that the title was not to pass till payment of the price; and that the plaintiffs might insure the machinery.

After the machinery was placed in the mill, the purchasers gave to the plaintiffs a mortgage on the mill property, and this mortgage contained a covenant to insure.

Subsequently the plaintiffs insured the mill and machinery, and the purchasers, without their knowledge, also placed insurance thereon.

The mill and machinery were destroyed by fire, and the plaintiffs were unable to recover on the policies held by them, owing to the breach of statutory condition 8, and they claimed the benefit of the purchasers' insurance of the machinery:—

Per HAGARTY, C. J. O., and MACLENNAN, J. A. That the plaintiffs were entitled to the moneys payable to the purchasers under their policy, the mortgage being the governing instrument:—

Per BURTON, and OSLER, JJ. A.—That they were not so entitled, the machinery being by the agreement personal property and not included in the mortgage or protected by the covenant to insure.

In consequence of the division of opinion, the judgment of FALCONBRIDGE, J., in favour of the plaintiffs, was affirmed. *Waterous Engine Works Co. v. McCann*, 486.

4. *Assignment—Consolidation.*—Mortgagors of land sold it subject to the mortgage, the purchaser giving them a second mortgage to secure part of the purchase money. He then sold the land subject to both mortgages, which his sub-purchaser covenanted to pay off. Subsequently, the first mortgagors, under threat of action, paid the claim of the first mortgagees, and took an assignment of the first mortgage to one of their number :—

Held, that the sub-purchaser, on being called on by the first mortgagors and first purchaser for indemnity against the first mortgage, was bound to pay it, and was not entitled to an assignment thereof, without also paying the second mortgage.

Judgment of BOYD, C., affirmed. *Thompson v. Warwick*, 637.

See Brethour v. Brooke et al., 144.

MUNICIPAL CORPORATIONS.

1. *Arbitration and Award—Withdrawal*—49 Vic. ch. 66 (O.)—46 Vic. ch. 18, secs. 393, 404 (O.)—Sub-section 6 of section 1 of 49 Vic. ch. 66 (O.) (The Don Improvement Act), makes applicable to an arbitration under that Act all the provisions of the Consolidated Municipal Act of 1883 as to arbitrations, including section 404 which enables the council to refuse to ratify the award, and not merely the provisions for determining the amount of compensation, OSLER, J.A., dissenting on this point.

Per OSLER, J.A.—Though the wording of sub-section 6 of section 1 of 49 Vic. ch. 66 (O.), is not wide enough to give the council this

power, yet such power may be exercised, for the land expropriated under the Don Improvement Act is real property entered upon, taken or used by the corporation in the exercise of its powers within the meaning of section 393 of the Consolidated Municipal Act of 1883, 46 Vic. ch. 18 (O.), so that section 404 applies.

Judgment of ROSE, J., reversed. *In re McColl and The City of Toronto*, 256.

2. *Highway—Repair—Sidewalk—Ice—Negligence.*—Allowing, for a fortnight, water to collect and alternately freeze and thaw in a depression in a sidewalk in a frequented street in a town, is non-repair for which the municipality is liable.

Judgment of the Chancery Division, 23 O. R. 355, affirmed, BURTON, J. A., dissenting. *Derochie v. Town of Cornwall*, 279.

3. *County Road—Joint Stock Road Company Act*—C. S. U. C. ch. 49—*Queenston and Grimsby Road.*—*Held*, that the legislation and proceedings thereunder, set out in the judgment of the Court, relating to the Queenston and Grimsby road and the city of St. Catharines, did not make the city liable to pay to the county of Lincoln any part of the expenditure of the latter in connection with that road.

Effect of the withdrawal of city from jurisdiction of county upon roads owned by the county passing through the city, considered.

Regina v. Louth, 13 C. P. 616; *Regina v. Brown and Street* *ib.* 357; *St. Catharines Road Co. v. Gardner*, 21 C. P. 190, specially referred to.

Unless specially retained by statute, the withdrawal of a city from the jurisdiction of the county ter-

minates all liability of the former in taxation for county purposes.

An agreement by a city withdrawn from the jurisdiction of the county to contribute towards the maintenance and repairs of a county road is ultra vires the city corporation.

Judgment of the Common Pleas Division affirmed. *County of Lincoln v. City of St. Catharines*, 373.

4. *Drains — Added Territory—Nuisance.*—Drains originally constructed under township authority for the drainage of surface water merely, may, after the territory has been added to a city, be adopted by the city as common sewers, after which householders using them with the consent or approval of the city are not responsible for nuisance at the outlet.

Judgment of MELWETH, J., reversed, BURTON, J. A., dissenting. *Levis v. Alexander*, 613.

See NUISANCE — *McDonald v. Dickenson et al.*, 455.

NEGLIGENCE

1. *Nuisance—Highway—Steam Whistle on Adjoining Land—Horse—Evidence.*—The mere fact that a horse while being driven along the highway has been frightened by the whistle of a steam engine, used by the defendants for the purpose of their lawfully operated water-works, is not sufficient to make them responsible for damages resulting from the horse having run away. Some positive evidence of negligence in the use of the whistle must be given, or at least some evidence that its use might be expected to cause such

an accident, so as to cause it to be a nuisance to the highway.

Judgment of the County Court of Huron reversed. MATHENAK, J. A., dissenting. *How v. Village of Lucknow*, 1.

2. *Contributory Negligence—Evidence—Issue of Fact—Jury—Verdict.*—In an action to recover damages for negligence, tried with a jury, where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and the defendant, and though the judge may rule negatively that there is no evidence to go to the jury on either issue he cannot declare affirmatively that either is proved. The question of proof is for the jury.

Wheeler v. Canadian Pacific R. W. Co., 16 A. R. 101, was a non-jury case, and did not hold for the disposition of a case tried with a jury.

Judgment of the Queen's Bench Division affirmed. *Morrow v. Canadian Pacific R. W. Co.*, 149.

3. *Evidence of—Nuisance—Highway.*—Allowing a broken down waggon to remain on the highway, clear of the track of a street railway, for nearly two hours, is not in itself sufficient evidence of negligence to support an action by a person who strikes against the waggon while passing in a street car. Such a broken down waggon does not become a nuisance or obstruction to the highway, until, having regard to the difficulty of removing it, it has been allowed to remain thereon for an unreasonable time.

Judgment of the County Court of York affirmed. *Howden v. Lake Simcoe Ice Co.*, 414.

4. *Nuisance — Highway — Damages — Overhanging Cornice.*]—The owner of a building, from which a cornice overhanging the sidewalk falls, because the nails fastening it to the building have become loosened by ordinary decay, and injures a passer-by, is liable in damages without proof of knowledge on his part of the dangerous condition of the cornice, the defect being one that could have been ascertained by him by reasonable inspection.

Judgment of FALCONBRIDGE, J., affirmed. *Roberts v. Mitchell*, 433.

5. *Evidence — Shop—Child of Tender Years.*]—The fact that a child of tender years, while in a shop with its mother, by the invitation and for the benefit of the proprietors, is injured by an unfastened mirror, standing against the wall, falling upon it, the cause of the fall being unknown, is, in itself, sufficient evidence of negligence to justify the case being submitted to a jury.

Judgment of the Queen's Bench Division, 25 O. R. 78, affirmed. *Sangster v. The T. Eaton Company, (Limited)*, 624.

6. *Evidence — Damages — Nonsuit.*]—Where a workman was killed by the explosion of a tank in which refuse was being boiled into soap, and there was no direct evidence as to the cause of the explosion, evidence of experts who had examined the tank, stating that the screws fastening the tank cover were defective, and that the explosion was probably due to this cause, was held sufficient to justify the submission of the case to the jury.

Judgment of the Chancery Division affirmed. *Badcock v. Freeman*, 633.

7. *Dangerous Machinery — Absence of Guard—"Moving Machinery"—"Defect in Machinery"—Factories Act—R. S. O. ch. 208, sec. 15 —Workmen's Compensation for Injuries Act—R. S. O. ch. 141—sec. 3 —52 Vic. ch. 23, sec. 3 (O.).*]—The absence of a guard to a projecting screw in a revolving spindle, part of a radial drill, which was used to fasten the drilling tool into the spindle, is a violation of the provisions of the Factories Act, R. S. O. ch. 208, sec. 15, the spindle being a "moving part of the machinery," within the meaning of that Act, and it is also a "defect in the condition of the machinery," within the meaning of the Workmen's Compensation for Injuries Act, R. S. O. ch. 141, sec. 3, as amended by 52 Vic. ch. 23, sec. 3 (O.), and in either view, damages may be recovered for an accident caused by its absence.

Judgment of the Common Pleas Division, 25 O. R. 12, affirmed; BURTON, J.A., dissenting. *O'Connor v. Hamilton Bridge Co.*, 596.

See BAILMENT—MUNICIPAL CORPORATIONS, 2—RAILWAYS, 1, 2, 4, 5 —*Brown v. Defoe*, 466; *McDonald v. Dickenson*, 485.

NEGOTIABLE INSTRUMENT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

NEW TRIAL.

See RAILWAYS, 1.

NONSUIT.

See NEGLIGENCE, 2, 6.

NOTICE

See COMPANY, 1—REGISTRY ACT.

NOTICE OF ACTION.

See *McDonald v. Dickenson et al.*, 485.

NOVELTY.

See PATENT OF INVENTION.

NUISANCE.

Water — Municipal Corporations — Arbitration and Award — Appointment of Arbitrator—Submission — Practice — Appeal — Appeal Book—Costs.]—The defendants the corporations of two townships, without being bound to do so, built a culvert under the highway between the townships, to which the other defendant, the owner of lands adjoining one side of the highway, in order to carry off the surface water of his lands, built a drain, and subsequently a “gangway” of stones for the convenience of access to the highway, which had the effect of damming the water on his land. He afterwards made an opening in the “gangway,” and the water suddenly rushing through the culvert, flooded the plaintiff’s land on the other side of the highway, which was also connected with the culvert by a receiving drain, through which he had theretofore permitted the water in its ordinary course to flow :—

Held, that the defendants the corporations were not, but that the other defendant was, liable for the damage sustained by the plaintiff.

The provisions of a submission to arbitration in reference to the ap-

pointment of a third arbitrator must be strictly followed. Where, therefore, a submission provided that the third arbitrator should be appointed by writing endorsed thereon under the hands of the arbitrators therein named and the appointment was not so endorsed, the award was held invalid.

The costs of printing unnecessary material disallowed.

Judgment of GALT, C. J., reversed in part. *Bryce v. Loutit et al.*, 100.

See MUNICIPAL CORPORATIONS, 4—NEGLIGENCE, 1, 3, 4.

ONUS OF PROOF.

See NEGLIGENCE, 2.

OPTION.

See LANDLORD AND TENANT—SALE OF GOODS.

PARTIES.

See RAILWAYS, 2.

PATENT OF INVENTION.

Novelty—Specification—Ambiguity.]—There is no inventive merit in making in one piece the cap-bar and protector of a washing machine, the cap-bar and protector having been previously made in two separate pieces.

A specification providing merely that such a protector is to be arranged “at an angle” is void for uncertainty.

Judgment of the Chancery Division affirmed. *Taylor v. Brandon Manufacturing Co.*, 361.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 2.

PATHMASTER.

See *McDonald v. Dickenson*, 495.

PAYMENT.

See **ATTACHMENT—MORTGAGE**, 2
—**PRINCIPAL AND AGENT—WILL**, 3.

PENALTY.

See **CONTRACT**, 1.

PERFORMANCE.

See **SALE OF GOODS**.

PLAN.

See **EVIDENCE**.

POSSESSION.

See **STATUTE OF LIMITATIONS**, 1—*Brethour v. Brooke et al.*, 144.

POWER OF SALE.

See *Brethour v. Brooke et al.*, 144.

PRACTICE.

See **ATTACHMENT — LIFE INSURANCE—NUISANCE**.

PRESCRIPTION.

See **STATUTE OF LIMITATIONS**, 2

PRINCIPAL AND AGENT.

Banks and Banking—Bills of Exchange and Promissory Notes—Payment—Set-off—Debtor and Creditor.]
—Bankers are subject to the principles of law governing ordinary agents, and, therefore, bankers to whom as agents a bill of exchange is forwarded for collection, can receive payment in money only, and cannot bind the principals by setting off the amount of the bill of exchange against a balance due by them to the acceptor.

Judgment of the County Court of York affirmed. *Donogh v. Gillespie*, 292.

See *Grant v. Northern Pacific Junction R. W. Co.*, 322.

PRIORITY.

See **MORTGAGE**, 1.

PROHIBITION.

Division Court — Garnishee — Defendant—R. S. O. ch. 51, sec. 235.]
—A garnishee is not a defendant within the meaning of sections 235 *et seq.* of the Division Courts Act, R. S. O. ch. 51, and is not examinable under after-judgment summons.

Judgment of the Queen's Bench Division, 23 O. R. 493, affirmed. *In re Hanna v. Coulson*, 692.

PROMOTER.

See **COMPANY**, 2.

RAILWAYS.

1. *Carriers—Limitation of Liability—Conditions—Negligence—Shipping Contract—Horse—51 Vic. ch. 29, sec. 246 (D.)—Damages—New Trial.*]—The plaintiff delivered to the defendants a race horse for transport over part of their line of railway, nothing being said as to its value, and at the time signed a shipping contract which stated that the horse was received for transport at a special named rate, and that in consideration of this special rate the defendants should not be liable for any loss unless caused by collision, and then only to the extent of \$100. The horse was killed in a collision caused by the defendants' negligence, and the jury found that its value was \$5,000 :—

Held, per HAGARTY, C. J. O. That the special limitation having been entered in good faith on the declared value of \$100, and not for the purpose of evading liability, was valid and not in contravention of 51 Vic. ch. 29, sec. 246 (D.).

Per BOYD, C. That under that section the limitation of liability for damages resulting from negligence was invalid, but that a new trial should be ordered because the damages were excessive.

Per OSLER, J. A. That there is nothing in the Act which forbids a fair agreement between the carrier and shipper limiting the sum for which, in case of loss arising from negligence, the former shall be liable, although the shipper cannot be forced into such an agreement ; that in this case the plaintiff was estopped by his own representation from contending that the horse was of greater value than the amount agreed on.

Per MACLENNAN, J. A. That a limitation of liability against dam-

ages caused by negligence would be valid as being in effect a pre-ascertainment of the amount of damages, but that the particular shipping contract in question, having regard to the freight classification made under section 226 of the Act, did not effect such a limitation, and that a new trial should be ordered because the damages were excessive.

Vogel v. Grand Trunk R. W. Co., 11 S. O. R. 612, considered.

In the result the judgment of the Common Pleas Division, dismissing the action, 24 O. R. 75, was affirmed. *Robertson v. The Grand Trunk R. W. Co. of Canada*, 204.

2. *Corporations — Delegation of Powers—Negligence—Fire—42 Vic. ch. 9, sec. 60 (D.).*]—A railway company incorporated under the laws of this Province cannot, without legislative sanction, confer upon a foreign railway company the immunities and privileges which it possesses, and the foreign railway company, in running engines over the line of railway in this Province, is subject to the common law liability imposed upon a person using a dangerous and fire-emitting machine, and is liable for damages without proof of negligence.

Per HAGARTY, C. J. O., dissenting. Parliament has, in effect, sanctioned the agreements between the Canadian and foreign companies, and the user of locomotives by the latter is therefore lawful.

An insurance company by whom a fire loss has been paid has no *locus standi* as co-plaintiff in an action by the assured against the wrong-doer whose negligence has caused the fire.

Judgment of the Queen's Bench Division reversed. *Wealleans et al. v. The Canada Southern R. W. Co. et al.*, 297.

3. *Warehousemen — Carriers.*] — When a shipper stores goods from time to time in a railway warehouse, loading a car when a car-load is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers but of warehousemen, and in case of their accidental destruction by fire, the shipper has no remedy against the company.

Judgment of the Common Pleas Division, 23 O. R. 454, reversed. *Milloy v. Grand Trunk R. W. Co. of Canada*, 404.

4. *Negligence—Evidence of—Release.*]—A settlement of a pending action, agreed to by an illiterate plaintiff without communication with her solicitor and without fair disclosure of facts, cannot stand, and its validity may be tried in the pending action if pleaded in bar.

In an action to recover damages for causing the death of a person, there is sufficient evidence of negligence to be submitted to the jury, when it is sworn that the deceased was seen approaching the railway track in a vehicle just before the passing of a train; that immediately after the train passed the deceased and the horses were found dead at the crossing, and that the statutory signals of the approach of the train were not given.

Judgment of the Queen's Bench Division, 25 O. R. 65, affirmed. *Johnson v. Grand Trunk R. W. Co. of Canada*, 408.

5. *Ways—Excessive Speed—Negligence.*] — The Toronto Railway Company have not, under their charter and their agreement with the city of Toronto, an exclusive right of way upon their tracks or the

right to run their cars at any rate of speed they please. Whilst their cars must not be wilfully impeded, they are bound to recognize the rights and necessities of public travel and so to regulate the speed that the cars may be quickly stopped, should occasion require it.

Where, therefore, there was some evidence that an accident was the result of a car running at excessive speed, the judgment of the Common Pleas Division, upholding a verdict against the company, was affirmed. *Gosnell v. Toronto R. W. Co.*, 553.

See *Grant v. Northern Pacific Junction R. W. Co.*, 322.

REGISTRY ACT.

Easement—Notice—Equitable Interest.]—A municipal council, who, with the oral consent of the owner, build a sewer through land, acquire an equitable right to compel a conveyance of so much of the land as is occupied by the sewer, but a purchaser of the land without notice of the consent or of the existence of the sewer is protected by the Registry Act.

Judgment of ARMOUR, C. J., affirmed. *Jarvis v. City of Toronto*, 395.

RELEASE.

See RAILWAYS, 4.

REMOTENESS.

See DAMAGES.

RENEWAL.

See BANKS AND BANKING—BILLS OF SALE AND CHATTEL MORTGAGES, 1.

ROLL.

See ASSESSMENT AND TAXES.

SALE OF GOODS.

Quantity — Description — “Car-load” — Contract — Performance — Option.]—The defendants agreed to buy from the plaintiff a car-load of hogs at a rate per pound, live weight. The plaintiff shipped a “double-decked” car-load, and the defendants refused to accept this, contending that a “single-decked” car-load should have been shipped. There was conflicting evidence as to the meaning given in the trade to the term “car-load of hogs,” and it was shewn that hogs were shipped sometimes in the one way and sometimes in the other:—

Held [HAGARTY, C. J. O., dissenting], that the plaintiff had the option of loading the car in any way in which a car might be ordinarily or usually loaded, and that he having elected to ship a double-decked car-load, the defendants were bound to accept.

Judgment of the County Court of Middlesex reversed. *Hanley v. The Canadian Packing Co.*, 119.

SALE OF LAND.

See COMPANY, 2—VENDOR AND PURCHASER.

SECURITY.

See BANKS AND BANKING.

SET-OFF.

See PRINCIPAL AND AGENT.

SHARES.

See COMPANY, 3.

SHIPPING CONTRACT.

See RAILWAYS, 1.

SIDEWALK.

See MUNICIPAL CORPORATIONS, 2.

SOLICITOR.

See MORTGAGE, 2.

SPECIFICATION.

See PATENT OF INVENTION.

STAKEHOLDER.

See GAMING.

STATUTES.

50 Geo. III. ch. 1.]—*See* WAYS.

C. S. U. C. ch. 49.]—*See* MUNICIPAL CORPORATIONS, 3.

42 Vic. ch. 9, sec. 60 (D.).]—*See* RAILWAYS, 2.

46 Vic. ch. 18, secs. 393, 404 (O.).]—See MUNICIPAL CORPORATIONS, 1.

49 Vic. ch. 66 (O.).]—See MUNICIPAL CORPORATIONS, 1.

R. S. C. ch. 159, sec. 9.]—See GAMING.

R. S. O. (1887), ch. 28.]—See TIMBER.

R. S. O. (1887), ch. 47, sec. 19, sub-sec. 2.]—See COUNTY COURT.

R. S. O. (1887), ch. 51, sec. 113.]—See BANKS AND BANKING.

R. S. O. (1887), ch. 51, sec. 235.]—See PROHIBITION.

R. S. O. (1887), ch. 61, sec. 10.]—See WILL, 1.

R. S. O. (1887), ch. 67, sec. 6.]—See ATTACHMENT.

R. S. O. (1887), ch. 73.]—See *McDonald v. Dickenson et al.*, 485.

R. S. O. (1887), ch. 107, secs. 7, 11.]—See *Brethour v. Brooke et al.*, 144.

R. S. O. (1887), ch. 111, sec. 5, sub-sec. 4.]—See STATUTE OF LIMITATIONS.

R. S. O. (1887), ch. 124, sec. 1.]—See BANKS AND BANKING.

R. S. O. (1887), ch. 124, sec. 4.]—See ASSIGNMENTS AND PREFERENCES, 2.

R. S. O. (1887), ch. 124, sec. 12.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

R. S. O. (1887), ch. 125, sec. 6.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 2.

R. S. O. (1887), ch. 125, secs. 11, 15.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 1.

R. S. O. (1887), ch. 125, sec. 27.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 4.

R. S. O. (1887), ch. 136, sec. 5.]—See LIFE INSURANCE.

R. S. O. (1887), ch. 141.]—See MASTER AND SERVANT.

R. S. O. (1887), ch. 141, sec. 3.]—See NEGLIGENCE, 7.

R. S. O. (1887), ch. 193, sec. 120.]—See ASSESSMENT AND TAXES.

R. S. O. (1887), ch. 194.]—See INTOXICATING LIQUORS.

R. S. O. (1887), ch. 194, sec. 51 (2), 61.]—See CONSTITUTIONAL LAW.

R. S. O. (1887), ch. 208, sec. 15.]—See NEGLIGENCE, 7.

R. S. O. (1887), ch. 220.]—See WATER AND WATERCOURSES.

51 Vic. ch. 29, sec. 246 (D.).]—See RAILWAYS, 1.

52 Vic. ch. 23, sec. 3 (O.).]—See NEGLIGENCE, 7.

53 Vic. ch. 31, secs. 74, 75 (D.).]—See BANKS AND BANKING.

53 Vic. ch. 33, sec. 30, sub-sec. 4 (D.).]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

54 Vic. ch. 57, sec. 6 (O.).]—See HIGH SCHOOLS.

55 Vic. ch. 26, sec. 1 (O.).]—See BILLS OF SALE AND CHATTEL MORTGAGES, 4.

55 Vic. ch. 26, sec. 2 (O.).]—See BILLS OF SALE AND CHATTEL MORTGAGES, 1, 2.

55 Vic. ch. 42, sec. 590 (O.).]—See DRAINAGE, 2.

57 Vic. ch. 58, sec. 1 (O.).]—See HIGH SCHOOLS.

STATUTE OF LIMITATIONS.

Possession—Trespass—Fencing—“State of Nature”—R. S. O. ch. 111, sec. 5, sub-sec. 4.]—The expression “state of nature” in sub-section 4 of section 5 of R. S. O. ch. 111 is used in contra-distinction to the preceding expression, “residing upon or cultivating,” and unless the patentee of wild lands, or some one claiming

under him, has resided upon the land or has cultivated or improved it or actually used it, the twenty years' limitation applies. Clearing or cultivating by trespassers will not avail to shorten this limit.

Per BURTON, and MACLENNAN, JJ.A. Merely fencing in a lot without putting it to some actual, continuous use is not sufficient to make the statute run.

Judgment of the Queen's Bench Division affirmed. *Stovel v. Gregory*, 137.

2. *'Prescription — Easement.'*] — The time for acquisition of an easement by prescription does not run while the dominant and servient tenements are in the occupation of the same person, even though the occupation of the servient tenement be wrongful and without the privity of the true owner.

Judgment of the Chancery Division reversed. *Innes et al. v. Ferguson*, 323.

STOCK.

See COMPANY, 2.

SUBMISSION.

See NUISANCE.

SURVEY.

See EVIDENCE.

TENANT AT WILL.

See WATERS AND WATERCOURSES.

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TIMBER

License—Trespass—Crown Lands Department—R. S. O. ch. 28.]—The legal right of a licensee of timber limits under a license issued by the Ontario Crown Lands Department ceases (except as to the matters specially excepted by the Act) at the expiration of the license year, and there is no equitable right of renewal capable of being enforced against the Crown or sufficient to uphold a right of action for trespass committed after the expiration of the license and before the issue of a renewal.

The insertion in a license, after its expiration, of a lot omitted by error does not confer upon the licensee such a title as enables him to maintain an action for trespass committed on the omitted lot.

Judgment of the District Court of Muskoka reversed. *Muskoka Mill and Lumber Co. v. McDermott et al.*, 129.

See Brethour v. Brooke et al., 144.

TIME.

See CONTRACT, 1—VENDOR AND PURCHASER.

TITLE.

See VENDOR AND PURCHASER.

TRESPASS.

See STATUTE OF LIMITATIONS, 1—TIMBER.

TRUSTS AND TRUSTEES.

See ASSIGNMENTS AND PREFERENCES, 1—COMPANY, 2.

the meaning of R. S. O. ch. 136, sec. 5.

Re Lynn, Lynn v. Toronto General Trusts Company, 20 O. R. 475, and *Beam v. Beam*, 24 O. R. 189, approved.

Judgment of the County Court of Prince Edward on this point affirmed, OSLER, J. A., dissenting.

The practice in force before the Judicature Act, under which a plaintiff taking issue on and failing on an executor's plea of *plene administravit*, could not have judgment of assets *quando*, no longer exists, and it is now proper to give a plaintiff judgment of assets *quando*, if his debt be established and such a judgment be desired.

Judgment of the County Court of Prince Edward on this point reversed. *McKibbon v. Feegan*, 87.

LIMITATION OF LIABILITY.

See RAILWAYS, 1.

MACHINERY.

See MORTGAGE, 3.

MANSLAUGHTER.

See WILL, 3.

MARSHALLING.

See WILL, 1.

MASTER AND SERVANT.

Workmen's Compensation for Injuries Act—R. S. O. ch. 141—*Way*—*Defect*—*Hoist*.]—The plaintiff, a

workman, in going to his work, in the defendants' manufactory, passed as usual through a long passage, twelve feet wide, well lighted, and with which he was well acquainted, but instead of going straight to his work turned out of his way to look at some repairs that were being made on the elevator on the opposite side of the passage from where he should have been, and fell into the unguarded hole :—

Held, that there was no defect in the condition of the "way," within the meaning of the Workmen's Compensation for Injuries Act, R. S. O. ch. 141, for which the defendants were responsible.

Judgment of the Chancery Division, 23 O. R. 335, affirmed on other grounds. *Headford v. McClary Manufacturing Co.*, 164.

See CONTRACT, 2.

MAXIMS.

Res ipsa loquitur.]—See NEGLIGENCE, 4, 5.

Omnia præsumuntur rite esse acta.]—See WAYS.

MORTGAGE.

1. *Priorities — Assignment*.]—A testator devised the north half of his farm to one son and the east half of the south half to another son, the latter half being subject to mortgage. The devisee of the north half made several payments to the mortgagees, without any demand from them, reducing the mortgage debt to about \$100. The devisee of the east half of the south half gave a mortgage on his land, this mortgagee, before advancing the money, communicating

with the former mortgagees and obtaining from them a statement shewing the balance due to be about \$100, and then registering the mortgage. Subsequently the owner of the north half paid this balance and took an assignment expressed to be in consideration of \$1.00, and in these proceedings he claimed that he was entitled to hold the assignment for the full amount paid by him:—

Held, per HAGARTY, C. J. O., and OSLER, J. A. That there was nothing to shew that the payments, other than the last, were made on the faith of getting the assignment, and that even if they had been so made the right to an assignment was an equitable one and could not prevail against the duly registered second mortgage.

Per BURTON, J. A. That, on the evidence, it was not shewn that the payments had been made with the intention of taking an assignment.

Per MACLENNAN, J. A. That the payments by the devisee of the north half were properly made in view of the possible resort to the north half in case of deficiency in value of the south half but that the equitable right could not prevail against the duly registered second mortgage.

In the result the judgment of MERRIDITH, J., 23 O. R. 351, was affirmed. *McMillan v. McMillan*, 343.

2. *Payment—Solicitor—Authority of.*]—The onus of shewing that a solicitor who is in possession of a mortgage and collects the interest has authority also to collect the principal, is upon the mortgagor, and unless this onus is clearly discharged, the mortgagor and not the mortgagee must bear the loss arising from the solicitor's misappropriation of the funds.

Judgment of ROBERTSON, J., re-

versed. *In re Tracy, Scully v. Tracy*, 454.

3. *Fixtures — Machinery — Lien Agreement—Double Fire Insurance.*]

—The plaintiffs sold certain mill machinery under an agreement which provided that a mortgage of the mill property was to be given to them by the purchasers to secure the price; that the machinery was not to form part of the real estate, but was to remain personal property; that the title was not to pass till payment of the price; and that the plaintiffs might insure the machinery.

After the machinery was placed in the mill, the purchasers gave to the plaintiffs a mortgage on the mill property, and this mortgage contained a covenant to insure.

Subsequently the plaintiffs insured the mill and machinery, and the purchasers, without their knowledge, also placed insurance thereon.

The mill and machinery were destroyed by fire, and the plaintiffs were unable to recover on the policies held by them, owing to the breach of statutory condition 8, and they claimed the benefit of the purchasers' insurance of the machinery:—

Per HAGARTY, C. J. O., and MACLENNAN, J. A. That the plaintiffs were entitled to the moneys payable to the purchasers under their policy, the mortgage being the governing instrument:—

Per BURTON, and OSLER, JJ.A.—That they were not so entitled, the machinery being by the agreement personal property and not included in the mortgage or protected by the covenant to insure.

In consequence of the division of opinion, the judgment of FALCONBRIDGE, J., in favour of the plaintiffs, was affirmed. *Waterous Engine Works Co. v. McCann*, 486.

—Where land is devised upon condition that a mortgage thereon be paid by the devisee, and the devisor pays off the mortgage, the devise is good, such a condition being a condition subsequent.

A devisee who kills the devisor and is convicted of manslaughter therefor, does not forfeit the devise, the element of intent being in such case necessarily absent.

Cleaver v. Mutual Reserve Fund Life Association, [1892] 1 Q. B. 147, distinguished.

Judgment of *FERGUSON, J.*, 24 O. R. 132, affirmed on the former and reversed on the latter point. *McKinnon v. Lundy*, 560.

See LIFE INSURANCE — VENDOR AND PURCHASER.

WINDING-UP.

See COMPANY, 2, 3.

WORDS.

“*Car-load.*”]—See SALE OF GOODS.

“*Defect.*”]—See MASTER AND SERVANT—NEGLIGENCE, 7.

“*Defendant.*”]—See PROHIBITION.

“*Fee Simple.*”]—See WILL, 2.

“*Garnishee.*”]—See PROHIBITION.

“*Given for Patent Right.*”]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

“*Issue.*”]—See WILL, 2

“*Laying-out.*”]—See WAYS.

“*Moving Machinery.*”]—See NEGLIGENCE, 7.

“*Opening.*”]—See WAYS.

“*Owner.*”] — See WATERS AND WATERCOURSES.

“*State of Nature.*”]—See STATUTE OF LIMITATIONS.

“*Void as Against Creditors.*”]—See BILLS OF SALE AND CHATTEL MORTGAGES, 3.

“*Warehouse.*”] — See CONSTITUTIONAL LAW.

“*Way.*”]—See MASTER AND SERVANT.

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